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WILCOX & CO

No. 8346

Vol 2012

United States Circuit Court of Appeals

For the Ninth Circuit.

San Francisco Law Library

UNITED STATES OF AMERICA,

Appellant,

vs.

DANG MEW WAN LUM,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

FILED

OCT 30 1936

PAUL P. O'BRIEN,
CLERK

Parker Printing Co., 545 Sansome Street, San Francisco 60--10-24-36

No. 8346

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

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Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Parker Printing Co., 545 Sansome Street, San Francisco 60--10-24-36

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For the Applicant, Dang Mew Wan Lum,
No Attorney.

For the United States of America,
INGRAM M. STAINBACK, Esq.,
United States Attorney,
Federal Building,
Honolulu, T. H.
J. FRANK McLAUGHLIN, Esq.,
Assistant United States Attorney,
Federal Building,
Honolulu, T. H.
ERNEST J. HOVER, Esq.,
United States Naturalization Examiner,
Department of Immigration and Naturalization,
Honolulu, T. H. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Territory of Hawaii.

Petition No. 2789.

In the Matter of the Application of

DANG MEW WAN LUM

to Become a Citizen of the United States of America

CLERK'S STATEMENT.

Date of Commencement of Matter: April 4, 1936—Petition filed.

Name of Original Party: Dang Mew Wan Lum, petitioner.

Date of Filing Pleadings: April 4, 1936—Petition; Motion to Dismiss.

Date of Decision: April 4, 1936—Oral ruling in Court.

Date of Decree: April 4, 1936—Decree and Final Order of Court (Naturalization Petitions Recommended to be Denied).

Proceedings in the above-entiled matter were had before the Honorable S. C. HUBER, District Judge.

Dates of Filing Appeal Documents:

April 9, 1936—Exception to Ruling, Order and Decision of the Court and Notice of Appeal.

July 3, 1936—Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Citation Issued, Praecipe.

July 6, 1936—Bill of Exceptions. [2]

CERTIFICATE OF CLERK TO ABOVE STATEMENT.

United States of America,
Territory of Hawaii—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the name of the original party; the date when pleadings were filed; the date of the decision and final order of court; the name of the judge presiding and the dates when appeal documents were filed and issued in the above-entitled matter.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of September A. D. 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court, Territory of Hawaii.

[3]

Form 2204 -L-A
Original
(To be retained by clerk)

No. 2789

U. S. Department of Labor
Immigration and Naturalization Service

No. 96023

UNITED STATES OF AMERICA

Petition for Naturalization

To the Honorable the Judge, U. S. Dist. Court of Terr. of Hawaii at Honolulu, T. H.

The petition of Dang Mew Wan Lum, hereby filed, respectfully shows:

(1) My place of residence is 1169 Maunakea St. Hon., T. H. (2) My occupation is not employed.

(3) I was born in Honolulu, Hawaii on May 29, 1894. My race is Chinese.

(5) I am married. The name of my husband is Lum Chew Hung. We were married on May 2, 1910 at Dai Char, Chungshan, China; he was born at Dai Char, Chungshan, China on February 3, 1886; entered the United States at.....on..... for permanent residence and now resides at Chung Shan, China. I have no children, and the name, date and place of birth, and place of residence of each of said children are as follows:

(I departed for China May 16, 1907, SS "Siberia")

(6) My last foreign residence was Macao, Chungshan, China. I emigrated to the United States of America from Hongkong, China. My lawful entry in the United States was at Honolulu, T. H., under the name of Dang Mew Wan Lum on Oct. 19, 1934 on the vessel SS President Hoover.

(7) I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to The Republic of China of which at this time I am a citizen [4]. (8) I am able to speak the English language. (9) I have resided continuously in the United States of America since October 19, 1934 and in the County of Honolulu this State, continuously next preceding the date of this petition, since October 19, 1934. Petition filed under Sec. 4, Act of Sept. 22, 1922, as amended.

(10) I have not heretofore made petition for Naturalization: Number on at and such petition was denied by that Court for the following reasons and causes, to-wit.....

and the cause of such denial has since been cured or removed.

Attached hereto and made a part of this, my petition for citizenship, are the affidavits of the two verifying witnesses required by law.

Wherefore, I, your petitioner, pray that I may be admitted a citizen of the United States of America, I have not acquired any other nationality by affirmative act.

I, your aforesaid petitioner being duly sworn, depose and say that I have read this petition and know the contents thereof; that the same is true of my own knoweldge except as to matters herein stated to be alleged upon information and belief, and that as to those matters I believe it to be true; and that this petition is signed by me with my full, true name.

(s) DANG MEW WAN LUM,

(Complete and true signature of petitioner) [5]

AFFIDAVITS OF WITNESSES

Ching Sang Kam: Occupation, Storekeeper, residing at 1169 Maunakea St., Honolulu, T. H., and Chuck Hoy: Occupation, retired, residing at 32 South School St., Honolulu, T. H., each being severally, duly and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known and has been acquainted in the United States with Dang Mew Wan Lum, the petitioner above mentioned, since 1/1/1904 except from 5/16/07 to 10/19/34 and that he has personal knowledge that

the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that in his opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

(Chinese characters) (s) CHUCK HOY
(Signature of witness) (Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the Clerk of said Court at Honolulu, T. H. this 4th day of April, Anno Domini 1936.

[Seal] WM. F. THOMPSON, Jr.,
Clerk.
By (s) E. LANGWITH,
Deputy Clerk [6]

(Reverse side of petition)

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to THE REPUBLIC OF CHINA of which I have heretofore been a citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion; SO

HELP ME GOD. In acknowledgement whereof I have hereunto affixed my signature.

(s) DANG MEW WAN LUM
(Signature of petitioner)

Sworn to in open court, this 4th day of April, A. D. 1936.

WM. F. THOMPSON, Jr.,
Clerk.

By.....
Deputy Clerk.

Note: In renunciation of title of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or titles) an order of nobility, which I have heretofore held."

Petition granted: Line No. 1 of List No. 369 and Certificate No. 4093209 issued.

Petition denied: List No.....

Petition continued from .....to.....

Reason..... [7]

Original Petition No. 2789

Court 665

U. S. DEPARTMENT OF LABOR
Naturalization Service

CERTIFICATE OF EXAMINATION

I hereby certify that Dang Mew Wan Lum, residing at 1169 Maunakea St., Honolulu, T. H. an applicant for citizenship, and the required two witnesses, namely, Ching Sang Kam, residing at 1169

Maunakea St. Hon. T. H., Chuck Hoy, residing at 32 s. School St. Hon. T. H. appeared before me and were examined on April 4, 1936 in accordance with the act of September 22, 1922 (Sec. 4) as amended 3/3/31 and that the statements contained in the said applicant's petition for citizenship constitute the record of such examination.

Note to Clerk. This certification must be attached to the original petition for citizenship at the time of filing.

(s) ERNEST J. HOVER
U. S. Naturalization Examiner.

Form 2800 [8]

[Title of Court and Cause.]

MOTION TO DISMISS

Comes the undersigned Naturalization Examiner for and on behalf of the United States, and moves that this petition for naturalization be dismissed with prejudice, and as grounds therefor respectfully shows:

That it appears from said petition that this petitioner is a person of the Chinese race, and therefore is ineligible to naturalization unless she is within the exception provided in Section 4, Act of March 3, 1931, relating to "any woman who was a citizen of the United States at birth"; that petitioner was born at Honolulu, T. H., on May 29, 1894, and departed for China on May 16, 1907, where she married a Chinese national on May 2, 1910, which marriage endures, and that she first returned to the

Territory of Hawaii and the United States on October 19, 1934; that it follows petitioner is not included within the amendment of July 2, 1932, to the above act, as a woman who is to be considered as a citizen at birth, because she was not resident in the United States on July 2, 1932.

(s) ERNEST J. HOVER
U. S. Naturalization Examiner

[Endorsed]: Filed Apr. 4, 1936. [9]

Form 2352 Original List No. 369

U. S. DEPARTMENT OF LABOR
NATURALIZATION SERVICE

Date April 4, 1936

NATURALIZATION PETITIONS RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States for the District of Hawaii, sitting at Honolulu, T. H. (..... Division):

The undersigned, duly designated under the Act of June 8, 1926 (Public No. 358, 69th Cong.), to conduct preliminary hearings upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing each of the following one (1) petitioner for naturalization and their required witnesses, has found, for the reasons stated below, that such peti-

tions should not be granted, and therefore recommends that each of such petition be denied.

No.—1

Petn. No.—2789

Name of Petitioner—Dang Mew Wan Lum

Reason for Denial—Not entitled to exemption from racial exclusion as a former U. S. citizen at birth by reason of Hawaiian birth before June 14, 1900, because not resident in United States on July 2, 1932. [10]

Respectfully submitted:

Date April 4, 1936.

(s) ERNEST J. HOVER,
(Signature of designated examiner or officer)

United States of America
District of Hawaii,
.....Division—ss:

Upon consideration of the petitions for naturalization listed above, and the findings and recommendations thereon of a duly designated examiner or officer of the Bureau of Naturalization (or Naturalization Service), at a final hearing in open Court this 4th day of April, A. D. 1936, it is hereby ordered that the said petition be, and hereby is granted, and the petitioner having taken the oath prescribed by law, hereby is admitted to become a citizen of the United States of America, the above recommendation being hereby disapproved.

By the Court:

[Seal] (s) S. C. HUBER,
Judge. [11]

PROCEEDINGS AT HEARING, PETITION FOR NATURALIZATION GRANTED. EXCEPTION.

From the Minutes of the United States District Court for the Territory of Hawaii.

SATURDAY, April 4, 1936.

[Title of Court and Cause.]

Personally appeared the applicant herein. Mr. E. J. Hover, United States Naturalization Examiner, appeared for the government. This case was called for final hearing. Mr. Hover certified the facts of the case to the Court and recommended a dismissal. The Court granted the petition of the applicant and ordered that she be admitted a citizen of the United States on taking the oath of allegiance. The clerk administered the required oath. An exception to the admission of applicant was noted by Mr. Hover. [12]

ORDER EXTENDING TIME FOR THE PURPOSE OF SETTLING BILL OF EXCEPTIONS.

From the Minutes of the United States District Court for the Territory of Hawaii.

MONDAY, July 6, 1936.

[Title of Court and Cause.]

On this day came the applicant herein, Mr. J. Frank McLaughlin, Assistant United States Attor-

ney, appeared for the government. This case was called for hearing for allowance of a bill of exceptions on appeal. The bill of exceptions was allowed by the Court with the reservation by the Court that the applicant may be allowed an amendment to said bill of exceptions should she later hire counsel and in the event said counsel should deem an amendment necessary. The applicant was allowed one week in which to obtain counsel. [13]

PROCEEDINGS, BILL OF EXCEPTIONS ALLOWED.

From the Minutes of the United States District Court for the Territory of Hawaii.

MONDAY, July 13, 1936.

[Title of Court and Cause.]

On this day came the United States by Mr. J. Frank McLaughlin, its Assistant District Attorney. This case was called for hearing on the bill of exceptions herein. The bill of exceptions as presented was allowed. The Court stated that same would be signed. [14]

[Title of Court and Cause.]

EXCEPTION TO RULING, ORDER AND DECISION OF THE COURT AND NOTICE OF APPEAL.

To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

Comes now THE UNITED STATES OF AMERICA, by INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, and excepts to the ruling of the Court overruling the Motion of the United States of America to dismiss the above entitled petition and to the ruling, order and decision of the Court that the above entitled petition of applicant be granted, on the ground that same are contrary to the law, the evidence, and the weight of the evidence, and on the further specific ground that the Petitioner was not a citizen of the United States at birth and is not eligible to naturalization by the terms of the Act of July 2, 1932, C. 395, (8 U. S. C. A. 368b) and the Act of September 22nd, 1922, C. 411, Section 3b, as amended March 3rd, 1931, C. 442, Section 4a (8 U. S. C. A. 369a), and is not eligible to become a citizen under other naturalization law of the United States, and the United States of America hereby gives notice of appeal.

Dated: Honolulu, T. H., this 9th day of April, 1936.

THE UNITED STATES OF AMERICA.
By INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii.
By (s) SAMUEL SHAPIRO,
Special Assistant United States Atty., District of Hawaii.

[Endorsed]: Filed Apr. 9, 1936. [16]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable S. C. Huber, Judge of the United States District Court for the Territory of Hawaii:

Comes now THE UNITED STATES OF AMERICA, feeling aggrieved by the final Order of the Court entered in the above entitled matter on the 4th day of April, A. D. 1936, and hereby appeals from said final Order to the United States Circuit Court of Appeals for the Ninth Circuit; that the errors upon which such appeal is based are contained in the Assignment of Errors filed herewith; that petitioner prays its appeal be allowed and that a citation be issued in accordance with law, and that an authenticated transcript of the record, pro-

ceedings and exhibit on the hearing be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated at Honolulu, T. H., this 3rd day of July, A. D. 1936.

THE UNITED STATES OF AMERICA,
by its attorney,
INGRAM M. STAINBACK,
United States Attorney
District of Hawaii.
By (s) J. FRANK McLAUGHLIN,
Assistant.

Attest:
(s) WM. F. THOMPSON, JR.,
Clerk of the above entitled court.

Receipt of a copy of the within is hereby acknowledged this 3rd day of July, A. D. 1936.
(s) DANG MEW WAN LUM.

[Endorsed]: Filed Jul. 3, 1936. [18]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now THE UNITED STATES OF AMERICA, and files the following Assignment of Errors upon which it will rely on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I.

The Court erred as a matter of law in overruling the Motion made in behalf of the United States to dismiss the petitioner's application for naturalization, as follows:

(Caption Omitted)

"MOTION TO DISMISS.

"Comes the undersigned Naturalization Examiner for and on behalf of the United States, and moves that this petition for naturalization be dismissed with prejudice, and as grounds therefor respectfully shows:

"That it appears from said petition that this petitioner is a person of the Chinese race, and therefore is ineligible to naturalization unless she is within the exceptions provided in Section 4, Act of March 3, 1931, relating to 'any woman who was a citizen of the United States at birth'; that petitioner was born at Honolulu, T. H., on May 29, 1894, and departed for China on May 16, 1907, where she married a Chinese national on May 2, 1910, which marriage endures, and that she first returned to the [20] Territory of Hawaii and the United States on October 19, 1934; that it follows petitioner is not included within the amendment of July 2, 1932, to the above act, as a woman who is to be considered as a citizen at birth, because she was not resident in the United States on July 2, 1932.

(s) ERNEST J. HOVER,
U. S. Naturalization Examiner."

Motion was overruled orally and an exception on behalf of THE UNITED STATES OF AMERICA was noted.

II.

The decision and final Order of the Court is contrary to law.

WHEREFORE, THE UNITED STATES OF AMERICA, appellant, prays that the final Order in said matter be reversed and the matter remanded, with instructions to the trial Court as to further proceedings therein, and for such other and further relief as may be just in the premises.

Dated at Honolulu, T. H., this 3rd day of July, A. D. 1936.

THE UNITED STATES OF AMERICA
By its Attorney
INGRAM M. STAINBACK
United States Attorney
District of Hawaii
By (s) J. FRANK McLAUGHLIN
Assistant

Receipt of a copy of the within is hereby acknowledged this 3rd day of July, A. D. 1936.

(s) DANG MEW WAN LUM

[Endorsed]: Filed Jul. 3, 1936. [21]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

THE UNITED STATES OF AMERICA, in the above entitled action having filed herein its Petition for an Appeal from the Final Order entered thereon on the 4th day of April, A. D. 1936, now on motion of Ingram M. Stainback, United States Attorney for the District of Hawaii, attorney for the petitioner,

IT IS ORDERED, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final Order heretofore entered herein, be, and the same hereby is, allowed, and that a certified transcript of the record, proceedings and exhibit on the hearing be forwarded to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated at Honolulu, T. H., this 3rd day of July, A. D. 1936.

By the Court:

(s) S. C. HUBER
Judge

Attest:

(s) WM. F. THOMPSON, JR.,
Clerk of the above entitled Court.

Receipt of a Copy of the within is hereby acknowledged this 3rd day of July, 1936.

(s) DANG MEW WAN LUM.

[Endorsed]: Filed Jul. 3, 1936. [23]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States of America, to:
Dang Mew Wan Lum, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the date this Citation bears date, pursuant to an appeal allowed and filed in the office of the Clerk of the District Court of the United States for the District of Hawaii, from a final Order in said matter filed and entered on the 4th day of April, 1936, wherein THE UNITED STATES OF AMERICA is appellant and you are appellee, to show cause, if any there be, why the final Order rendered in this matter should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS, the Honorable S. C. HUBER, Judge of the United States District Court for the Territory of Hawaii, this 3rd day of July, A. D. 1936.

[Seal] S. C. HUBER,
Judge, United States District Court for the Territory of Hawaii.

Due personal service of the within Citation, by copy, is hereby admitted this 3rd day of July, A. D. 1936.

DANG MEW WAN LUM,
Appellee [25]

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED that the above entitled matter came on for hearing in said Court on the 4th day of April, A. D. 1936, within the October Term of said Court, the Honorable S. C. Huber, Judge of said Court, presiding; that at said hearing THE UNITED STATES OF AMERICA, through Naturalization Examiner for the District of Hawaii, E. J. Hover, appeared in opposition to the granting of said petition; that the undisputed facts appearing from the Petition for Naturalization are: that DANG MEW WAN LUM is of Chinese race and parentage, that she was born at Honolulu, Hawaii, on May 29, 1894; that on May 16, 1907 she departed from the Hawaiian Islands for China aboard the S. S. "Siberia"; that on May 2, 1910 she married Lum Cheu Hung at Dai Char, Chungshan, China, a Chinese person ineligible to become a citizen of the United States and who was born in China on February 3, 1886; that DANG MEW WAN LUM reentered the United States on October 19, 1934 for the first time since her 1907 departure; that she renounced citizenship in the Republic of China and that she had not acquired any citizenship subsequent to her loss of United States citizenship by marriage to an alien, by any affirmative act on her part; [27]

Thereupon, on behalf of THE UNITED STATES OF AMERICA, said Naturalization Examiner E. J. Hover presented to said Court the following Motion to Dismiss said petition:

(Caption Ommited)

"MOTION TO DISMISS

"Comes the undersigned Naturalization Examiner for and on behalf of the United States, and moves that this petition for naturalization be dismissed with prejudice, and as grounds therefor respectfully shows:

"That it appears from said petition that this petitioner is a person of the Chinese race, and therefore is ineligible to naturalization unless she is within the exception provided in Section 4, Act of March 3, 1931, relating to 'any woman who was a citizen of the United States at birth'; that petitioner was born at Honolulu, T. H., on May 29, 1894, and departed for China on May 16, 1907, where she married a Chinese national on May 2, 1910, which marriage endures, and that she first returned to the Territory of Hawaii and the United States on October 19, 1934; that it follows petitioner is not included within the amendment of July 2, 1932, to the above act, as a woman who is to be considered as a citizen at birth, because she was not resident in the United States on July 2, 1932.

(s) ERNEST J. HOVER
U. S. Naturalization Examiner"

that the Court orally overruled said Motion to Dismiss, to which an exception was noted by THE UNITED STATES OF AMERICA, and orally ruled that said petitioner was entitled to naturaliza-

tion, and accordingly issued on said April 4, 1936 a final Order to that effect, whereupon the oath of allegiance to the United States was duly administered to said petitioner on April 4, 1936, and Naturalization Certificate No. 4093209 was issued to the naturalized petitioner.

Thereafter, on the 9th day of April, 1936, Ingram M. Stainback, United States Attorney for the District of Hawaii, in behalf of THE UNITED STATES OF AMERICA filed exceptions to the final Order of said Court as follows: [28]

(Caption Omitted)

"EXCEPTION TO RULING, ORDER AND DECISION OF THE COURT AND NOTICE OF APPEAL.

"To the Honorable, the Presiding Judge of the United States District Court for the Territory of Hawaii:

"Comes now THE UNITED STATES OF AMERICA, by Ingram M. Stainback, United States Attorney for the District of Hawaii, and excepts to the ruling of the Court overruling the Motion of the United States of America to dismiss the above entitled petition and to the ruling, order and decision of the Court that the above entitled petition of applicant be granted, on the ground that same are contrary to the law, the evidence, and the weight of the evidence, and on the further specific ground that the Petitioner was not a citizen of the United

States at birth and is not eligible to naturalization by the terms of the Act of July 2, 1932, C. 395, (8 U.S.C.A. 368b) and the Act of September 22nd, 1922, C. 411, Section 3b, as amended March 3rd, 1931, C. 442, Section 4a (8 U.S.C.A. 369a), and is not eligible to become a citizen under any other naturalization law of the United States, and the United States of America hereby gives notice of appeal.

"Dated: Honolulu, T. H., this 9th day of April, 1936.

THE UNITED STATES OF AMERICA
By INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii,
By (s) SAMUEL SHAPIRO
Special Assistant United States Atty., District of Hawaii."

WHEREFORE, the Court during the October, 1935, Term, having extended that Term for the purpose of settling bills of exceptions, in order that THE UNITED STATES OF AMERICA may submit said final Order for review to the United States Circuit Court of Appeals for the Ninth Circuit, it now presents to the Judge presiding at said hearing this Bill of Exceptions and prays that the same, being found conformable to the truth, be allowed and signed by said Judge. [29]

Dated at Honolulu, T. H., this 3rd day of July, A. D. 1936.

THE UNITED STATES OF AMERICA
By its Attorney
INGRAM M. STAINBACK
United States Attorney
District of Hawaii
By (s) J. FRANK McLAUGHLIN
Assistant

Presented, July 3rd, A. D. 1936.
(s) S. C. HUBER
Judge

Allowed, July 6th, A. D. 1936.
(s) S. C. HUBER
Judge

[Endorsed]: Filed July 6, 1936. [30]

[Title of Court and Cause.]

PRAECIPE

To: WILLIAM F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii:

You will please incorporate in the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled matter, the following:

1. Petition for Naturalization
2. Clerk's Minutes

3. Order of Court extending time for the purpose of settling exceptions
4. Motion to Dismiss
5. Decision and Final Order of Court
6. Exceptions to Decision and Final Order
7. Bill of Exceptions
8. Petition for Appeal
9. Order Allowing Appeal
10. Assignment of Errors
11. Citation of Appeal with Admission of Service
12. This Praecipe, with Admission of Service
13. Clerk's Certificate [32]

Dated at Honolulu, T. H., this 3rd day of July, A. D. 1936.

THE UNITED STATES OF AMERICA
By its Attorney
INGRAM M. STAINBACK
United States Attorney
District of Hawaii.
By (s) J. FRANK McLAUGHLIN
Assistant

Due personal service of the within Praecipe, by copy, is hereby admitted this 3rd day of July, A. D. 1936.

(s) DANG MEW WAN LUM
Appellee.

[Endorsed]: Filed Jul. 3, 1936. [33]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COUT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Territory of Hawaii—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 33 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above entitled cause, as the same remains of record and on file in my office and I further certify that I am attaching hereto the original citation on appeal and that the costs of the foregoing transcript of record on appeal are $16.30 and that said amount has been charged by me in my account against the United States.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said court this 24th day of September A. D. 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
Territory of Hawaii. [34]

[Endorsed]: No. 8346. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Dang Mew Wan Lum, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed October 2, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8346

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DANG MEW WAN LUM,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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District of Hawaii,

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Assistant United States Attorney,
District of Hawaii,

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Immigration and Naturalization Service,
Honolulu, Hawaii,

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San Francisco, California,

Attorneys for Appellant.

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CLERK

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No. 8346

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DANG MEW WAN LUM,
Appellee.

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

BRIEF FOR APPELLANT.

OPINION BELOW.

The only previous decision in this case is that of the United States District Court for the Territory of Hawaii (R. p. 11), which is not officially reported.

JURISDICTION.

This appeal involves the naturalization laws. The appellee petitioned the Court below for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended. (See 8 U.S.C.A., Sections 369, 369a and 368b.)

This appeal is taken from the decision and final order of the District Court entered April 4, 1936. (R. p. 12.) The petition for appeal was filed July 3, 1936 (R. p. 15), and allowed on the same date. (R. p. 19.) The jurisdiction of this Court is invoked under Section 128a of the Judicial Code as amended by the Act of February 13, 1925. (28 U.S.C.A., Sec. 225.)

STATUTES INVOLVED.

The statutes involved are:

(a) Act of March 2, 1907, c. 2534, Sec. 3, 34 Stat. 1228. (See 8 U.S.C.A., Sec. 9, note 6.)

(b) Act of September 22, 1922, c. 411, Sec. 4, 42 Stat. 1022, as amended (see 8 U.S.C.A., Sec. 369) by the

(c) Act of July 3, 1930, c. 835, Sec. 2(a), 46 Stat. 854. (See 8 U.S.C.A., Sec. 369.)

(d) Act of March 3, 1931, c. 442, Sec. 4(a), 46 Stat. 1511. (See 8 U.S.C.A., Sec. 369a.)

(e) Act of July 2, 1932, c. 395, 47 Stat. 571. (See 8 U.S.C.A., Sec. 368b.)

The above statutes are set out in the Appendix.

PRELIMINARY STATEMENT.

To date the appellee has not employed counsel to represent her on this appeal, though advised to do so. The appellee may not file a brief.

STATEMENT OF FACTS.

The operative facts are: The appellee, Dang Mew Wan Lum, nee Dang Mew Wan (female), a person of the Chinese race, was born May 29, 1894, in Honolulu, Hawaii. On May 16, 1907, the appellee went to China, and there, at Dai Char, Chungshan, on May 2, 1910, married Lum Chew Hung, a person of the Chinese race, born February 3, 1886, at Dai Char, Chungshan, China.

On October 19, 1934, the appellee first returned to the United States, entering through the Port of Honolulu, Territory of Hawaii.

On April 4, 1936, the appellee petitioned the Court below for naturalization, pursuant to Section 4 of the Act of September 22, 1922, as amended. The sworn petition stated, in addition to the foregoing facts (R. p. 4), that the appellee remained married to the said Lum Chew Hung, and that she had not during her absence acquired other nationality by an affirmative act.

The Court below, over appellant's objections, held the appellee eligible for naturalization, and on April 4, 1936, the appellee executed the requisite formalities and had issued to her Naturalization Certificate No. 4,093,209.

QUESTIONS PRESENTED.

Is a woman of the Chinese race, who had lost her United States citizenship by marriage, prior to March 3, 1931, to an alien ineligible to citizenship, and who

has not acquired other nationality by affirmative act, eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended (8 U.S.C.A., Secs. 369, 369a, and 368b), though she did not reside in the United States on July 2, 1932 (8 U.S.C.A., Sec. 368b)?

SPECIFICATION OF ERRORS.

The appellant relies upon both of the assigned errors, to wit:

I.

The Court erred as a matter of law in overruling the motion made in behalf of the United States to dismiss the petitioner's application for naturalization, as follows:

(Caption omitted.)

"MOTION TO DISMISS.

Comes the undersigned Naturalization Examiner for and on behalf of the United States, and moves that this petition for naturalization be dismissed with prejudice, and as grounds therefor respectfully shows:

That it appears from said petition that this petitioner is a person of the Chinese race, and therefore is ineligible to naturalization unless she is within the exception provided in Section 4, Act of March 3, 1931, relating to 'any woman who was a citizen of the United States at birth'; that petitioner was born at Honolulu, T. H., on May 29, 1894, and departed for China on May 16, 1907,

where she married a Chinese national on May 2, 1910, which marriage endures, and that she first returned to the Territory of Hawaii and the United States on October 19, 1934; that it follows petitioner is not included within the amendment of July 2, 1932, to the above act, as a woman who is to be considered as a citizen at birth, because she was not resident in the United States on July 2, 1932.

ERNEST J. HOVER,
U. S. Naturalization Examiner."

II.

The decision and final order of the Court is contrary to law.

It is obvious that both assignment of errors present the same question of law. Accordingly, for the purposes of this brief the argument will treat both assignment of errors together.

SUMMARY OF THE ARGUMENT.

I.

The appellee was not born a citizen of the United States of America.

II.

The appellee lost her United States citizenship by her marriage in 1910 to an alien ineligible to citizenship.

III.

The appellee is not eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended by the Act of July 2, 1932.

ARGUMENT.

I.

THE APPELLEE WAS NOT BORN A CITIZEN OF THE UNITED STATES OF AMERICA.

As of the date of appellee's birth in Hawaii (May 29, 1894), the Provisional Government (January 17, 1893, to July 4, 1894, exc.) obtained in the Hawaiian Islands. On July 4, 1894, the Republic of Hawaii (July 4, 1894, to August 12, 1898) assumed sovereign jurisdiction over the Hawaiian Islands. By virtue of Article 17 of the Constitution of the Republic of Hawaii the appellee became at the inception of said Republic and remained during its existence a citizen of the Republic of Hawaii.

On June 14, 1900, by reason of having been on August 12, 1898, a citizen of the Republic of Hawaii, the appellee, together with all who had been on August 12, 1898, citizens of said Republic, was collectively naturalized a citizen of the United States by chap. 339, Sec. 4 of the Organic Act of April 30, 1900. (31 Stat. 141.)

II.

THE APPELLEE LOST HER UNITED STATES CITIZENSHIP BY HER MARRIAGE IN 1910 TO AN ALIEN INELIGIBLE TO CITIZENSHIP.

The Act of March 2, 1907, chap. 2534, Sec. 3, 34 Stat. 1228, provided that "Any American woman who marries a foreigner shall take the nationality of her husband * * *" This statutory provision remained in effect until September 22, 1922 (42 Stat. 1022), at which time it was specifically repealed, and the potential prospective operation of its designated methods of the reacquisition of the United States citizenship upon the termination of the marital status was also specifically cancelled. (c. 411, Secs. 3, 7, 42 Stat. 1022; see 8 U.S.C.A., Sec. 369, and *Mackenzie v. Hare* (1915), 359 U.S. 299, 36 S. Ct. 106.) Parenthetically it may be observed that even after said Act of September 22, 1922, and up until the Act of March 3, 1931 (c. 442, Sec. 4(a), 46 Stat. 1511, 8 U.S.C.A., Sec. 9), the marriage of a woman citizen to an alien ineligible to citizenship resulted in the woman's loss of United States citizenship.

The appellee's 1910 marriage, therefore, to Lum Chew Hung, an alien Chinese, caused the appellee to lose her United States citizenship, and also to become in the eyes of the United States an alien of the Chinese race.

III.

THE APPELLEE IS NOT ELIGIBLE FOR NATURALIZATION PURSUANT TO SECTION 4 OF THE ACT OF SEPTEMBER 22, 1922, AS AMENDED BY THE ACT OF JULY 2, 1932.

Being a person of the Chinese race, the appellee would not be eligible for naturalization unless Congress had made an exception. (8 U.S.C.A., Secs. 359, 363.)

Not until March 3, 1931 (c. 442, Sec. 4(a), 46 Stat. 1511), did Congress provide for the naturalization of a woman while married to a person ineligible to citizenship.

But on that date (March 3, 1931) Congress provided that a former native born woman citizen who had lost her United States citizenship by marriage to an alien ineligible to citizenship could, if she had not acquired other nationality by her affirmative acts, be naturalized in the manner prescribed by Section 369 of Title 8, U.S.C. Congress further provided in the same section of the statute (8 U.S.C.A., 369a) that a woman who was a United States citizen at birth should not be denied naturalization under Section 369 of Title 8, U.S.C., on account of her race.

Here was an apparent method by which this appellee could reacquire United States citizenship. She had lost her United States citizenship by marriage to Lum Chew Hung, an alien Chinese. She had not acquired other nationality by her affirmative acts. She was not barred because she was a person of the Chinese race. But, was she at birth (Honolulu, 1894) a citizen of the United States?

The answer to that question is definitely "NO"; the reason being set forth in detail in part I of the Argument in this brief.

That this negative answer is legally accurate is inferentially attested to by the statutory enactment of July 2, 1932. (c. 395, 47 Stat. 571, 8 U.S.C.A., 368b.)

On July 2, 1932, Congress recognized the predicament of women of the appellee's class. It observed with accuracy that not until June 14, 1900, were persons born in Hawaii United States citizens by reason of the common law principle of "jus soli" of which the 14th Amendment is declaratory. (See *U. S. v. Wong Kim Ark,* 169 U.S. 649, 18 S. Ct. 456.)

By the Act of July 2, 1932 (c. 395, 47 Stat. 571, 8 U.S.C.A., 368b), Congress provided that for the purposes of Section 369a of Title 8, United States Code, "a woman born in Hawaii prior to June 14, 1900, shall, *if residing in the United States on July 2, 1932,* be considered to have been a citizen of the United States at birth". (Italics added.)

This statute brought the appellee one step closer to a means of reacquiring United States citizenship.

Yet—the medium of naturalization pursuant to Section 369 of Title 8, U.S.C., still remained unavilable to this appellee, for the precise reason that *she was not residing in the United States on July 2, 1932.*

Why Congress so limited this class of women for the purposes of Section 369a of Title 8, U. S. C., does not concern us here. What is controlling is that Congress has spoken distinctly and precisely. It has said

that for the purposes of Section 369a of Title 8, U. S. C., a woman, born in Hawaii prior to June 14, 1900, who has lost her United States citizenship by marriage to an alien ineligible for citizenship, and who has not acquired other nationality by affirmative act, may—though not a free white person, nor of African nativity or descent (8 U.S.C.A., Sec. 359), and notwithstanding the fact that the woman is a person of the Chinese race (8 U.S.C.A., 363)—be naturalized pursuant to Section 369 of Title 8, U. S. C., *IF* she was residing in the United States on July 2, 1932.

The appellee was not residing in the United States on July 2, 1932. She first returned after her 1907 departure in October, 1934.

THEREFORE, the appellee was not eligible for naturalization pursuant to Section 4 of the Act of September 22, 1922, as amended by the Act of July 2, 1932 (8 U.S.C.A., 369, 369a, 368b), and the Court below erred in overruling the appellant's motion to dismiss the appellee's petition for naturalization thereunder, and further erred in holding the appellee to be eligible for naturalization under said statute.

> "Citizenship is a high privilege, and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor of the United States and against the claimant."
>
> *U. S. v. Manzi,* 276 U.S. 463, 467.

CONCLUSION.

It is submitted that the errors of law committed by the trial Court were prejudicial to the appellant's rights, and that this Court should so hold and reverse the trial Court's decision and order appellee's naturalization certificate cancelled.

Dated, Honolulu, T. H., this 6th day of November, A. D. 1936.

Respectfully submitted,

INGRAM M. STAINBACK,
United States Attorney,
District of Hawaii,

J. FRANK MCLAUGHLIN,
Assistant United States Attorney,
District of Hawaii,

ERNEST J. HOVER,
United States Department of Labor,
Immigration and Naturalization Service,
Honolulu, Hawaii,

H. H. MCPIKE,
United States Attorney,
San Francisco, California,

Attorneys for Appellant.

Due service and receipt of a copy of the foregoing brief is hereby admitted this 12th day of November, A. D. 1936.

Dang Mew Wan Lum,
Appellee.

(Appendix Follows.)

Appendix.

Appendix

The Act of March 2, 1907, c. 2534, Sec. 3, 34 Stat. 1228 (see 8 U.S.C.A., Sec. 9, note 6), reads as follows:

> "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a counsel of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

The Act of September 22, 1922, c. 411, Sec. 4, 42 Stat. 1022, as amended (see 8 U.S.C.A., Sec. 369), which reads as follows:

> "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign State of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United

States under section 17 of this title. Nothing herein shall be construed to repeal or amend the provisions of section 15 of this title or of section 17 with reference to expatriation. The repeal of section 3 of Act March 2, 1907, chapter 2534, Thirty-fourth Statutes, page 1228, which provided that 'any American woman who marries a foreigner shall take the nationality of her husband', and that 'at the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein,' shall not restore citizenship lost thereunder, nor terminate citizenship resumed thereunder; and any woman who had resumed thereunder citizenship lost by marriage shall, from September 22, 1922, have for all purposes the citizenship status as immediately preceding her marriage."

The Act of July 3, 1930, c. 835, Sec. 2(a), 46 Stat. 854 (see 8 U.S.C.A., Sec. 369), which reads as follows:

"(a) A woman who has lost her United States citizenship by reason of her marriage to an alien eligible to citizenship or by reason of the loss of United States citizenship by her husband may, if eligible to citizenship and if she has not acquired any other nationality by affirmative act, be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(1) No declaration of intention and no certificate of arrival shall be required, and no period

of residence within the United States or within the county where the petition is filed shall be required;

(2) The petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

(3) The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

(4) If there is attached to the petition, at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing.

(b) After her naturalization such woman shall have the same citizenship status as if her marriage, or the loss of citizenship by her husband, as the case may be, had taken place after July 3, 1930."

The Act of March 3, 1931, c. 442, Sec. 4(a), 46 Stat. 1511 (see 8 U.S.C.A., Sec. 369a), which reads as follows:

"Any woman who before March 3, 1931, has lost her United States citizenship by residence abroad after marriage to an alien or by marriage to an alien ineligible to citizenship may, if she has not acquired any other nationality by affirmative act, be naturalized in the manner prescribed in section 369 of this title. Any woman who was a citizen of the United States at birth shall not be denied naturalization under section 369 on account of her race."

The Act of July 2, 1932, c. 395, 47 Stat. 571 (see 8 U.S.C.A., Sec. 368b), which reads as follows:

"For the purposes of section 369a of this title, a woman born in Hawaii prior to June 14, 1900, shall, if residing in the United States on July 2, 1932, be considered to have been a citizen of the United States at birth."

Article 17 of the Constitution of the Republic of Hawaii reads as follows:

"All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

Chapter 339, Section 4, of the Organic Act of April 30, 1900 (31 Stat. 141), reads as follows:

"That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii.

And all citizens of the United States resident in the Hawaiian Islands who were resident there on or since August twelfth, eighteen hundred and ninety-eight, and all the citizens of the United States who shall hereafter reside in the Territory of Hawaii for one year shall be citizens of the Territory of Hawaii."

No. 8352

United States

Circuit Court of Appeals

For the Ninth Circuit.

MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Territory of Hawaii.

FILED

DEC - 4 1936

PAUL P. O'BRIEN,
CLERK

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8352

United States

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MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

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Parker Printing Company, 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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WILLSON C. MOORE, Esq.,
Assistant United States Attorney,
Federal Building, Honolulu, Hawaii.

For the Defendants, MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

E. J. BOTTS, Esq.,
Stangenwald Building,
Honolulu, Hawaii. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Territory of Hawaii.

Cr. No. 8718.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG alias YUK MOON,
Defendants.

CLERK'S STATEMENT.

Time of Commencing Suit:

January 17, 1936—Indictment filed.

Names of Original Parties:

The United States of America, Plaintiff.

Mrs. Ah Fook Chang alias Kam Yuen and Robert Chang alias Yuk Moon.

Dates of Filing Pleadings:

January 17, 1936—Indictment.

January 24, 1936—Motion to Suppress Evidence.

January 25, 1936—Answer to Motion to Suppress Evidence.

January 27, 1936—Traverse to Answer.

February 14, 1936—Motion to Suppress Evidence.

February 15, 1936—Answer to Motion to Suppress Evidence.

February 20, 1936—Motion for New Trial.

February 24, 1936—Affidavit in Diminution of Record.

Times When Proceedings Were Had:

January 17, 1936—Indictment filed.

January 20, 1936—Arraignment, continuance for plea.

January 30, 1936—Hearing on motion to suppress evidence. Pleas of not guilty. [2]

February 10, 1936—Motion to Suppress Evidence denied.

February 17, 1936—Hearing on motion to Suppress Evidence as to Mrs. Ah Fook Chang. Motion denied.

February 18, 1936—Proceedings at trial, continuance for further trial.

February 19, 1936—Proceedings at further trial. Verdict.

February 24, 1936—Hearing on motion for new trial.

February 29, 1936—Motion for new trial denied. Sentence.

Proceedings in the above-entitled matter were had before the Honorable S. C. HUBER, District Judge.

Dates of Filing Appeal Pleadings:

March 3, 1936—Petition for Appeal.
Assignment of Errors.

March 5, 1936—Cost Bond.

March 7, 1936—Order Allowing Appeal.

March 7, 1936—Citation Issued.

March 18, 1936—Praecipe for Transcript of Record.

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT.

United States of America,
Territory of Hawaii—ss.

I, WM. F. THOMPSON, JR., Clerk of the United States Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties, the several dates when the respective pleadings were filed; the dates when appeal documents were filed and issued in the above- [3] entitled cause and the name of the judge presiding.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 22nd day of September, A. D., 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, United States District
Court, Territory of Hawaii. [4]

[Title of Court and Cause.]

INDICTMENT.

Count I.

Violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1914, as amended by the Act approved May 26, 1922, and known as THE NARCOTIC DRUGS IMPORT AND EXPORT ACT.

Count II.

Violation of Section I of the Act approved December 17, 1914, as amended.

A true bill.

(s) RILEY H. ALLEN
Foreman.

(s) INGRAM M. STAINBACK
United States Attorney,
District of Hawaii.

I hereby order a Bench Warrant to issue forthwith on the within indictment for the arrest of the defendant therein named, bail hereby being fixed at $.....

.....
Judge, U. S. District Court,
Territory of Hawaii. [5]

Filed Jan. 17, 1936, at 11 o'clock and 23 minutes a. m. Wm. F. Thompson, Jr., Clerk, by (s) Thos. P. Cummins, Deputy Clerk.

[Title of Court.]

The United States of America,
District of Hawaii—ss:

COUNT I.

The Grand Jurors of the United States, empaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oaths, present that:

MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG alias YUK MOON, on or about the 18th day of December, 1935, at Hilo, County of Hawaii, Territory of Hawaii, and within the said district and within the jurisdiction of this Court, did jointly, unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit: 70,008 grains of smoking opium and opium prepared for smoking, which said narcotic drug as they, the said MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG alias YUK MOON then and there well knew had been theretofore imported and brought into the United States contrary to law and to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT II.

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present, that heretofore, to wit: On the 18th day of December, 1935, [6] at Hilo, County of Hawaii, Territory of Hawaii, and within the district aforesaid and within the jurisdiction of this court, Mrs. Ah Fook Chang alias Kam Yuen and Robert Chang alias Yuk Moon the identical persons named in the first count of this indictment, did jointly, knowingly, unlawfully, fraudulently,

and feloniously purchase, sell, dispense, and distribute 70,008 grains of smoking opium and opium prepared for smoking from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium and opium prepared for smoking then and there was a compound, manufacture, salt, derivative, and preparation of opium and was so purchased, sold, dispensed, and distributed by the said MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG alias YUK MOON, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(s) INGRAM M. STAINBACK
United States Attorney,
District of Hawaii. [7]

[Title of Court and Cause.]

VERDICT.

Filed Feb. 19, 1936, at 5 o'clock and 29 minutes p. m. (s) WM. F. THOMPSON, JR., Clerk. [8]

We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find as follows: MRS. AH FOOK CHANG alias KAM YUEN

Of Count One Guilty with leniency
Of Count Two Guilty with leniency

and as to ROBERT CHANG alias YUK MOON
Of Count One Guilty
Of Count Two Guilty

of the Indictment heretofore filed herein.

Dated: Honolulu, T. H., this 19th day of February, 1936.

(s) S. M. HULL
Foreman. [9]

SENTENCE.

The COURT: It is the judgment and sentence of the Court that MRS. AH FOOK CHANG, on the first count of this indictment, on the Import and Export Act, shall be imprisoned in Oahu Prison for the period of TWO (2) years, and shall pay a fine in the sum of $500.00, together with the costs of this Court. That, as to the defendant ROBERT CHANG, on the first count of this indictment, he be imprisoned in Oahu Prison for the period of TWO (2) years, and pay a fine of $500.00, together with the costs of this Court. That, as to the second count of this indictment, MRS. AH FOOK CHANG shall be imprisoned in Oahu Prison for the period of one year and one day.

Mr. MOORE: May it please the Court, with reference to this count two, as to Mrs. Ah Fook Chang, I think possibly it would be a good deterrent if she were placed on probation on that particular count so the Court would more or less have her under control for the next five years. How does Your Honor react to that suggestion?

Mr. BOTTS: Why not place her on parole entirely, Your Honor; the jury recommended leniency.

The COURT: Yes, when the Court is giving her two years when it might give her 15, I think it's very lenient. In one other case not more than a year ago there was a sentence of 5 years and a fine of $5,000.00, where the amount of opium involved was of little if any greater value than in this case. [10]

In view of the recommendation of the United States Attorney as to count two, it is the judgment of the Court that Mrs. Ah Fook Chang be fined the sum of $250.00; that as to any imprisonment, sentence will be suspended and defendant placed on probation for the term of Five (5) years, under Rule 131.

That, as to Robert Chang, as to count two, he shall be imprisoned for the period of one year and a day, without fine, the sentences to run concurrently as to Robert Chang. [11]

U. S. EXHIBIT "A"
admitted 2-18-36

Crim. #8718 U. S. Exhibit #7 marked for indent.

Statement of

ROBERT CHANG

alias Yuk Moon taken in the Hilo Police Station by Narcotic Agent William K. Wells at 8:30 P. M. December 19th 1935.

Q. What is your name?

A. Robert Chang alias Yuk Moon.

(Testimony of Robert Chang.)

Q. Where do you live?

A. Vineyard Street Wailuku Maui.

Q. When did you come to Hilo?

A. December 18, 1935.

Q. Did you sail from Maui or Honolulu?

A. Honolulu.

Q. How did you come to leave Honolulu for Hilo instead to Maui?

A. I left Maui on the 16th of December 1935 went to Honolulu and left for Hilo on the 17th of December 1935 arriving in Hilo on the morning of the 18th 1935.

Q. Why did you go to Honolulu?

A. My mother asked me if I wanted to go to Honolulu to bring some opium to Hilo, so I went and she gave me $50.00 for my expenses I was to go to the Oahu Garment Co. on 78 N. King street and to look for a man by the name of Hong Yin Pin, and he was to give me this stuff. (In this blue note book found in your dress suit case the name of Hong Yin Pin is written in it is this the man you was to see yes, book shown to Robert Chang with the name of HONG YIN PIN" written in it and identified by him as being his property.)

Q. Did you meet this man?

A. I met a man I do not know who he was and I showed an envelope with Chinese and Haole written on it I asked him is that your name, he said yes and wanted me to give him the envelope and I tore it up. Then he said when you want the stuff, I said by 1:30 in the afternoon he told me

(Testimony of Robert Chang.)

to follow him but I did not want to so he told me to meet him at the corner of Kukui and Nuuanu Avenue and at Flower Shop which is on the corner, I waited there a long time in a taxi, then he came to my car and signal me to come I followed him and he took me to a house upstairs to his room and told me to wait there and he would telephone for the stuff. Then he left me and I was alone in the room and his pictures were on the wall. Then he came back and asked me for the money so I told him that I could not give him the money and then he said we go down stairs then we went in the back of the Flower shop and the two packages wrapped in Xmas paper were there then he said give me the money I took the envelope which I had in my pocket and opened it before I had it opened he told me to give it to him and I gave it to him. Then he told me to go.

Q. Did he tell you where to bring this stuff to Hilo?

A. I don't remember. [12]

Q. Then where did you go?

A. I went to my friend's house by the name of Henry Ching, my suit case was in the parlor and I put one package in the suit case and one I held in my arm, then I went to the boat.

Q. Did you see your mother on the boat at Mala that night?

A. Yes.

Q. Did you talk with your mother that night on the boat?

A. Yes.

(Testimony of Robert Chang.)

Q. Did you and your mother stay at the same hotel when you arrived in Hilo?

A. No.

Q. Did you come to Hilo Town alone or with your mother from the boat?

A. I came alone.

Q. Where did you go and stay in Hilo?

A. Mauna Kea Rooms.

Q. What time was Mrs. Chun Doon supposed to come and get the stuff?

A. I don't know sometime around 7:00 P. M.

Q. How much money did you deliver to Hong Yin Pin in Honolulu?

A. I do not know how much money was in the envelope?

Q. Who gave you this envelope containing the money?

A. Dang Wing Kong, at his house in the back of the Public Service Station, Wailuku, Maui.

Q. What was his instructions to you?

A. He told me to go to 78 North King Street Oahu Garment Company and see a man by the name of Hong Yin Pin and to be sure that I was to see Hong Yin Pin personally, then he gave me two envelopes one containing money and the other Hong Yin Pin's address, then I sailed for Honolulu.

Q. When you arrived in Honolulu what did you do?

A. I went to the Oahu Garment Company and went down stairs and asked a chinese man if he was Hong Yin Pin he said no he is up stairs so I went

(Testimony of Robert Chang.)

up stairs and found Hong Yin Pin and I gave him an envelope and gave him the code word given me by Dang Wing Kong I then went up stairs with Hong Yin Pin and he showed me his cloth material then he told me to come up later to the corner of Kukui Street and Nuuanu Avenue at a flower shop and wait for him there.

Q. Who paid your expenses for this trip?

A. Dang Wing Kong he gave me $50.00.

Q. What else did Dang Wing Kong tell you?

A. He told me that if I got the money from Mrs. Chun Doon ($3,000.00) to take it back to him.

Q. In the first part of this statement you stated that your mother gave you the $50.00 for your expenses is that true or not?

A. No that is not true Dang Wing Kong gave me the money in Maui. [13]

(s) ROBERT CHANG
alias YUK MOON

Witness:
(s) WM. J. MARTIN
(s) JOHN B. DE MELLO

Subscribed and sworn to before me this 19th day of December A. D. 1935.

(s) WILLIAM K. WELLS
Dec. 20, 1935

Q. Did you give the Police Officers permission to search your room?

A. I was standing outside on the sidewalk, when three men came up to me and one of the men said he was a Police Officer, at the same time showing

(Testimony of Robert Chang.)

me a badge, and asked permission to search my room, I said O. K. and I took them up to my room (No. 10) at the Mauna Kea Rooms I unlocked the door, I entered the room, followed up the three Officers, I turned on the lights and opened the suit case, they found one box containing tins of opium in the suit case and one box containing tins of opium on the table.

(s) ROBERT CHANG

Witnesses

(s) E. W. ROSEHILL

(s) R. TAKEMOTO

(s) WM. K. WELLS [14]

U. S. EXHIBIT "B"

admitted 2-19-36

Crim. #8718 U. S. Exhibit #8. marked for indent.

Statement of

MRS. AH FOOK CHANG

taken in the Office of the Police Inspector George J. Richardson at Hilo Hawaii on Thursday Evening December 19, 1935 at 9:50 P. M. by Narcotic Agent Wm. K. Wells in the presence of Capt. Wm. J. Martin, Geo. J. Richardson, John B. de Mello.

Q. What is your name?

A. Mrs. Ah Fook Chang alias Kam Yuen.

Q. What is your husband's name?

A. Ah Fook Chang.

Q. Where do you live?

(Testimony of Mrs. Ah Fook Chang.)

A. Vineyard Street, Wailuku, Maui.

Q. When did you come to Hilo?

A. Yesterday morning December 18, 1935.

Q. When you arrived in Hilo where did you go to stay?

A. Okino Hotel Kamehameha Avenue.

Q. Have you a son by the name of Robert Chang?

A. Yes.

Q. Was Robert Chang, on the same boat with you when you came to Hilo?

A. Yes.

Q. Where did you get on the boat at Mala or Honolulu?

A. Honolulu.

Q. Did you know that Robert was going to be on that boat?

A. I was not sure, but I thought that he might be on the boat.

Q. Did you talk to your son Robert on the boat that night?

A. Yes, he came to my state room and we had a talk there.

Q. Do you know why your boy was on the boat that night?

A. One day last week in Maui a man by the name of Dang Wing Kong came to my house and asked me if my son Robert wanted to go to Honolulu and get a package and bring same to Hilo I said that it was up to the boy if he wanted to I

(Testimony of Mrs. Ah Fook Chang.)

went home and asked Robert if he wanted to go to Honolulu and he said sure. Then I told him to go and see Dang Wing Kong.

Q. Who paid for Robert's expenses for this trip?

A. I did not see the money but Robert told me that Dang Wing Kong had given him the money.

Q. Who was your son to see in Honolulu when he got there?

A. I don't know but my son showed me an envelope with the address of the Oahu Garment Company and another envelope with the name of Hong Yin Pin on it.

Q. Who were you and your son going to deliver this opium in Hilo?

A. To the wife of Chun Doon who has a store in Hilo by the railroad track. [15]

Q. Did Mrs. Chun Doon write to you people to bring this opium up?

A. No, she wrote to Dang Wing Kong of Wailuku Maui.

Q. What did Dang Wing Kong tell you to do when you get to Hilo?

A. He told me that the opium was worth $3,000.00 and if she gave me the money to deliver the money to him personally.

Q. Is this all you know in regards to the 24 tins of opium brought to Hilo by your son Robert and yourself on December 18, 1935?

A. Yes this is all.

(Testimony of Mrs. Ah Fook Chang.)

Q. This statement that you make is the whole truth and nothing but the truth.

A. Yes.

(s) MRS. AH FOOK CHANG

Witness:

(s) G. J. RICHARDSON

(s) WM. J. MARTIN

(s) JOHN B. DE MELLO

Subscribed and sworn to before me this 19th day of December A. D. 1935.

(s) WILLIAM K. WELLS [16]

No. 4120.

U. S. EXHIBIT "E"
admitted 2-19-36

Crim. 8718 U. S. Exhibit #9 marked for indent.

Form T-C Exb. 6.

PASSENGER'S IDENTIFICATION CHECK.

Issued at Kahului.

Reservations

NOT GOOD FOR TRANSPORTATION.

From KAHULUI
To Hon.
S. S. Wai
Sailing 12/16/35
Room 134 Berth B

Ticket of this number has been issued to: Mr. Robert Chang and covers passage, first class, from Kahului to Hon.

Full Half Qtr. Inft.
1

Inter-Island Steam Nav. Co., Ltd.
$8.50 By F

Instructions to Passengers.

This ticket check is the identification portion of your passage contract with the company. It is sold subject to the rules and regulations of the company's tariff on file with the United States Shipping Board and printed on the reverse side of this ticket. The regulations should be carefully read and this ticket check kept for identification and evidence of your right to transportation to destination shown on ticket.

(Reverse side)

PASSAGE CONTRACT.

1. This contract ticket is sold subject to rules and regulations of the Company's Tariff on file with the United States Shipping Board and available for inspection at offices of the Company. The term "carrier" as used in the following provisions, indicates Inter-Island Steam Navigation Company, Ltd. and shall be deemed to include, when appropriate the Vessel, her owners, operators, charterers, agents, officers and crew.

2. This ticket is non-transferable and its presentation is a condition to the furnishing of transportation represented hereby.

3. Fare covering transportation to be furnished hereunder shall be deemed paid in consideration of the Company's engagement to carry: No refund

will be made except as provided in the Company's Tariff.

4. Carrier undertakes no responsibility for transportation or care of passengers or baggage except on its own vessels: It is not [17] responsible for transportation beyond its own line or by any vessel of another Carrier, substituted as herein provided; nor shall it be responsible for care or storage of baggage or effects after landing same on dock at port of transfer or destination, such landing to be deemed redelivery thereof to passenger.

5. Carrier reserves the right to deny transportation or to reberth in the interest of other passengers or of the Vessel.

6. Advertised sailing and arrival times are approximately only: They may be delayed if Carrier shall deem it convenient or prudent to do so.

7. If the Vessel be prevented from leaving at or about the scheduled or advertised time, Carrier shall have liberty to substitute any other vessel, whether owned or operated by it or not, and to reberth passengers thereon: But if Carrier shall elect not to furnish such substitute vessel its only obligation hereunder shall be to afford transportation by the next regularly scheduled sailing of one of its vessels on which suitable accommodations are available, or, at passenger's option, to make refund of the fare paid.

8. Carrier is authorized to deviate the voyage in the interest of passengers of the Vessel for its own reasonable convenience, or to save life or property; all without incurring any liability to pas-

sengers on account thereof, or affecting the force of this contract.

9. Break-up of voyage by misfortune shall be deemed to complete transportation contracted for.

10. Liability for baggage, personal effects and other property of passengers: Carrier shall not be liable for any delay, loss or damage resulting to baggage, valuables or other property delivered into its custody, or to stateroom baggage, hand baggage, personal effects, money, valuables or other property retained by passenger in stateroom or on person when the same shall be occasioned by act of God, or of the public enemy; theft; peril of the seas; fire; collision stranding or other accident of navigation; restraint of government; barratry; desertion or revolt of crew; accident to or from machinery, boilers or steam or power explosion; latent defects in hull, machinery or fittings; unseaworthiness whether existing at the commencement of the voyage or not, provided Carrier shall have exercised due diligence to make the vessel seaworthy; or any other cause, whether or not of like or similar character to the foregoing, not directly attributable to its negligence. Nor shall Carrier be liable for any loss, theft or damage resulting by its negligence or otherwise to any money, jewelry, securities or other valuables not deposited with the Purser for safekeeping, during any time while such money and or other valuables are not needed for the passenger's personal use on board.

11. The regular fare payable for transportation under this ticket is based partly on the amount,

nature and value of the passenger's baggage and effects: For any excess in weight or bulk over tariff allowances, the established excess baggage charge must be paid, and Carrier will not be responsible for property which is not proper baggage under its Tariff rules. Likewise, in consideration of the regular fare, it is stipulated by passenger that the aggregate value of all property carried under full fare first-class ticket, including all baggage, personal effects and valuables, of whatever nature retained in passenger's custody, does not exceed $100.00 (half, quarter and infant fares in proportion to fare paid), and any liability of the Company or other persons or interests above mentioned for delay, loss, or theft thereof or damage thereto [18] shall not exceed such sum, unless passenger shall declare a greater value in writing to a ticket or freight agent of the Company before embarkation, paying excess value charge of one per cent (1%) on the amount by which the value so declared shall exceed the above value allowance. Passengers are in addition entitled to free safe deposit of money and small personal valuables up to $50, in value and in excess of that amount upon payment of excess value charge computed as above.

12. In addition to the restrictions upon its liability provided by this contract, carrier shall have the benefit of all statutes of the United States granting limitation of vessel-owners' liability.

13. The Carrier must have prompt notice of claims, and any suit must be promptly brought: The Carrier shall not be liable upon any claim in connec-

tion with this transportation (other than claims on account of death) written notice of which shall not have been filed with the Inter-Island Steam Navigation Company, Ltd., or its Agent, within thirty (30) days after arrival of the Vessel at passenger's destination, or in case of non-arrival from any cause, within thirty (30) days from the date the Vessel was due to arrive as above; and that Carrier shall not be liable upon any such claim for death, unless so filed within four (4) months after date of death. Nor shall the Carrier be liable to any suit based upon any claim filed as aforesaid unless commenced and process served within ninety (90) days after the filing of such claim. Provided, that if the fact or occurrence upon which any claim is based shall have made it impossible for the passenger or person claiming for his death to file the same within the time limited, a reasonable extension of time shall be allowed for this purpose.

14. This ticket shall expire thirty days from and after the date of issuance shown thereon and thereafter will not be valid for passage either going or return, nor will any refund of fare be made.

15. No agent or servant of Carrier shall have authority to alter or waive any of the conditions of this contract ticket.

INTER-ISLAND STEAM
NAVIGATION CO., LTD. [19]

[Title of Court and Cause.]

STIPULATION. [20]

Comes now THE UNITED STATES OF AMERICA, Plaintiff herein, and MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG alias YUK MOON, Defendants herein, through their respective attorneys, and hereby stipulate that Plaintiff's exhibit No. "F"—a note book found in a suitcase belonging to the Defendant ROBERT CHANG alias YUK MOON and containing on a page thereof the name "HONG YIN PIN"—need not be forwarded as an exhibit on appeal in this case but that in place and stead thereof the record may show that a small note book was found in the suitcase of the Defendant ROBERT CHANG alias YUK MOON, in his room shortly after his arrest, and that upon a page of that note book there appeared the name "HONG YIN PIN."

Dated: Honolulu, T. H., this 28th day of August, 1936.

THE UNITED STATES OF AMERICA
Plaintiff.

By its attorney:
INGRAM M. STAINBACK
United States Attorney
District of Hawaii
By (s) WILLSON C. MOORE
Assistant.

MRS. AH FOOK CHANG alias KAM YUEN and
ROBERT CHANG alias YUK MOON,
Defendants,

By their attorney:
(s) EBERT J. BOTTS [21]

INDICTMENT FILED.

From the Minutes of the United States District Court for the Territory of Hawaii.

Friday, January 17, 1936.

[Title of Court and Cause.]

The grand jury presented an indictment charging the defendants above named with the violation of the Narcotic Acts. The Court ordered that said indictment be filed. [22]

ARRAIGNMENT, CONTINUANCE FOR PLEA.

From the Minutes of the United States District Court, for the Territory of Hawaii.

Monday, January 20, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for arraignment. The defendants waived the reading of the indictment, consenting that the charge be entered in the words thereof. The court ordered that this case be continued to January 27, 1936 at 2 p. m. for plea. [23]

HEARING ON MOTION TO SUPPRESS EVIDENCE. PLEAS OF NOT GUILTY.

From the Minutes of the United States District Court for the Territory of Hawaii.

Thursday, January 30, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for hearing on a motion to suppress. Robert Chang was called and sworn and testified on his own behalf. U. S. Exhibit "A", signed statement of Robert Chang, Dec. 20, 1935, was admitted in evidence, marked and ordered filed. Later the original was withdrawn and a copy substituted. The defense rested. Lee A. Pearson, investigator, Alcohol Tax Unit, was called and sworn and testified on behalf of the United States. R. Takemoto, Police Officer, Hilo Police Department, was called and sworn and testified on behalf of the United States. W. K. Wells, narcotic agent, was called and sworn and testified on behalf of the United States. Both sides rested. The Court took this matter under advisement, respective counsel to file briefs. The defendants entered pleas of not guilty without prejudice. The Court ordered that this case be continued to February 17, 1936 at 9 a. m. for trial. [24]

MOTION TO SUPPRESS EVIDENCE DENIED.

From the Minutes of the United States District Court for the Territory of Hawaii.

Monday, February 10, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants by Mr. E. J. Botts, their counsel. This case was called for hearing on a motion to suppress the evidence. The motion was denied. An exception was noted and allowed. The Court instructed the clerk to call the jury for the purpose of trial of this case for February 17, 1936 at 9 a. m. [25]

HEARING ON MOTION TO SUPPRESS EVIDENCE AS TO MRS. AH FOOK CHANG. MOTION DENIED.

From the Minutes of the United States District Court for the Territory of Hawaii.

Monday, February 17, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for hearing on a motion to suppress as to the defendant Mrs. Ah Fook Chang. Mrs. Ah Fook Chang was called and sworn and testified on her own behalf. Robert

Chang was called and sworn and testified on behalf of the defense. The defense rested. G. J. Richardson, inspector of police, Hilo Police Department, was called and sworn and testified on behalf of the United States. William J. Martin, captain of police, Hilo Police Department, was called and sworn and testified on behalf of the United States. Antone B. Pacheco, police officer, Hilo Police Department, was called and sworn and testified on behalf of the United States. G. J. Richardson was recalled by the United States. Wm. K. Wells, narcotic agent, was called and sworn and testified on behalf of the United States. The United States rested. Mrs. Ah Fook Chang was called to testify further on her own behalf. Both sides rested. The Court ordered that this case be continued to 1:45 p. m. this day for argument. At 1:50 p. m. the case was resumed for argument. Argument was had by Mr. Botts. At 2:32 p. m. argument was had by Mr. Moore. At 3:00 p. m. further argument was had by Mr. Botts. At 3:10 p. m. the case was submitted. The motion to suppress evidence was denied by the Court. Mr. Botts noted an exception. [26]

PROCEEDINGS AT TRIAL, CONTINUANCE FOR FURTHER TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii.

Tuesday, February 18, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for trial. The following jurors were duly empaneled and sworn to try the issues herein: Herman F. Kuhlmann; Levi Polson; James M. Murray; Samuel M. Hull; Lawrence Gay; William L. Smith; William J. Hartung; Edwin S. Heise; Warren R. Starr; Tin Yau Alina; Charles R. Cartwright; and George R. Girdler. Mr. Moore read the indictment to the jury and made the opening statement for the prosecution. M. B. Bairos, Territorial Chemist and Analyst, was called and sworn and testified on behalf of the United States. U. S. Exhibit #1, 1 five tael tin of smoking opium, was marked for identification. U. S. Exhibit #2, 1 five tael tin of smoking opium, was marked for identification. R. Takemoto, police officer, South Hilo, County of Hawaii, was called and sworn and testified on behalf of the United States. U. S. Exhibit #3, cardboard box containing 11 five tael tins of smoking opium, was marked for identification. U. S. Exhibit #4, cardboard box containing 11 five tael tins of smoking opium, was marked for identification. U. S. Exhibit #5, 1 leather suit

case, was marked for identification. Lee A. Pearson, investigator, Alcohol Tax Unit, was called and sworn and testified on behalf of the United States. U. S. Exhibit #6, note book, was marked for identification. G. J. Richardson, inspector, Hilo Police Department, was called and sworn and testified on behalf of the United States. U. S. Exhibit #7, statement signed by the defendant Robert Chang, was marked for identification. U. S. Exhibit #8, [27] statement signed by Mrs. Ah Fook Chang, was marked for identification. Wm. J. Martin, Captain of Police, Hilo Police Department, was called and sworn and testified on behalf of the United States. Antone B. Pacheco, police officer, Hilo Police Department, was called and sworn and testified on behalf of the United States. It was stipulated as to the evidence of C. T. Stevenson if called to testify in this case. Wm. K. Wells, Federal Narcotic Agent, was called and sworn and testified on behalf of the United States. U. S. Exhibit #9, Inter-Island Steam Navigation Company passenger's identification check No. 4120, Kahului to Honolulu per S. S. Waialeale, sailing December 16, 1935, was marked for identification. U. S. Exhibit "A", heretofore marked for identification as U. S. Exhibit #7, was admitted in evidence, marked and ordered filed. The Court ordered that this case be continued to Wednesday, February 19, 1936 at 9 a. m. [28]

PROCEEDINGS AT FURTHER TRIAL. VERDICT.

From the Minutes of the United States District Court for the Territory of Hawaii.

Wednesday, February 19, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for further trial. It was stipulated that the jury heretofore empaneled and sworn to try the issues herein was present. Mr. Wells resumed the witness stand U. S. Exhibit "B", heretofore marked for identification as U. S. Exhibit #8, was admitted in evidence, marked and ordered filed. U. S. Exhibit "C", heretofore marked for identification as U. S. Exhibits #1 and #3, was admitted in evidence marked and ordered filed. U. S. Exhibit "D", heretofore marked for identification as U. S. Exhibits #2 and #4, was admitted in evidence, marked and ordered filed. U. S. Exhibit "E", heretofore marked for identification as U. S. Exhibit #9, was admitted in evidence, marked and ordered filed. U. S. Exhibit "F", heretofore marked for identification as U. S. Exhibit #6, was admitted in evidence, marked and ordered filed. U. S. Exhibit "G", heretofore marked for identification as U. S. Exhibit #5, was admitted in evidence, marked and ordered filed. All exhibits were admitted in evidence over the objection of Mr. Botts. The United States rested. Mr. Botts moved

to have the court reporter read to the jury the evidence given by these defendants before this court at the hearing on the motion to suppress the evidence in this case. The motion was denied and an exception allowed. The defense [29] then rested. At 10:25 a. m. argument was had to the jury by counsel for the prosecution. At 10:44 a. m. argument was had to the jury by counsel for the defense. At 11:30 a. m. the Court instructed the jury. At 11:59 a. m. bailiffs were sworn and the jury retired to deliberate upon a verdict. At 3:30 p. m. upon request of the jury and with the consent of respective counsel, certain exhibits in this case, to-wit signed confessions of each defendant, were sent to the petit jury room. At 5:29 p. m. the jury returned the following verdict: "We, the Jury, duly empaneled and sworn in the above entitled cause, do hereby find as follows: Mrs. Ah Fook Chang alias Kam Yuen of Count One Guilty with leniency, of Count Two guilty with leniency and as to Robert Chang alias Yuk Moon of Count One Guilty of Count Two Guilty of the Indictment heretofore filed herein. Dated: Honolulu, T. H., this 19th day of February, 1936. (s) S. M. Hull, Foreman. The Court ordered that said verdict be filed. Mr. Botts entered an exception to the verdict and gave notice of motion for new trial. The Court ordered that the matter of sentence herein be continued to Saturday, February 29, 1936 at 10 a. m.

[30]

HEARING ON MOTION FOR NEW TRIAL.

From the Minutes of the United States District Court for the Territory of Hawaii.

Monday, February 24, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants by Mr. E. J. Botts, their counsel. This case was called for hearing on a motion for new trial. The case was submitted without argument by respective counsel on the motion for new trial. The Court ordered that this case be continued to February 29, 1936 for ruling. [31]

MOTION FOR NEW TRIAL DENIED. SENTENCE.

From the Minutes of the United States District Court for the Territory of Hawaii.

Saturday, February 29, 1936.

[Title of Court and Cause.]

On this day came the United States by its Assistant District Attorney, Mr. Willson C. Moore, and also came the defendants with Mr. E. J. Botts, their counsel. This case was called for ruling on a motion for new trial. The motion for new trial was denied. An exception was noted and allowed. The Court ordered that as to the first count the defendant Mrs. Ah Fook Chang be imprisoned in Oahu

Prison for two years and pay a fine of $500.00 and, on the recommendation of the United States Attorney's Department, that as to the second count any sentence of imprisonment be suspended and the defendant placed on probation for five years under rule 131 of this court, that she pay a fine of $250.00 together with the costs of court. The Court ordered that as to the first count the defendant Robert Chang be imprisoned in Oahu Prison for two years and that he pay a fine of $500.00; that as to the second count he be imprisoned in Oahu Prison for one year and one day, said sentences to run concurrently, and that he pay the costs of court. Mittimus was stayed to March 7, 1936 at 10 a. m. [32]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Filed Mar. 3, 1936 at 3 o'clock and 05 minutes p. m. (s) WM. F. THOMPSON, JR., Clerk. [33]

To the Honorable, the Presiding Judge of the Above Entitled Court:

Come now MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON, defendants above named, and conceiving themselves aggrieved by the Judgment, Order and Sentence made and entered herein in the above entitled proceedings, do hereby appeal from said Judgment, Order and Sentence to the Circuit Court of Appeals

for the Ninth Circuit, and file herewith their Assignment of Errors intended to be urged upon appeal and pray that their appeal may be allowed and that a transcript of all proceedings and papers upon which said Judgment, Order and Sentence was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

MRS. AH FOOK CHANG
alias KAM YUEN and
ROBERT CHANG,
alias YUK MOON,
Defendants,
By (s) E. J. BOTTS
Their Attorney.

Receipt of a copy of the foregoing Petition for Appeal is hereby acknowledged, this 3rd day of Mar., 1936.

(s) WILLSON C. MOORE
Asst. U. S. District Attorney. [34]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Filed Mar. 3, 1936 at 3 o'clock and 05 minutes p. m. (s) WM. F. THOMPSON, JR., Clerk. [35]

Come now MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON, defendants above named, and say that in the records and proceedings of the above entitled matter there is manifest error and that the final decision and judgment is erroneous and against the just rights of said defendants in this, to-wit:

I.

That the Court erred in overruling and denying the motion of Robert Chang, alias Yuk Moon, one of the defendants herein, to suppress the evidence obtained as a result of the search and seizure on December 18, 1935, when Hilo Police Officers accompanied by a Federal Officer entered his room in the Maunakea Rooming House and searched the same under the pretended authority of his consent to such search, no such consent, as a matter of law, having been given or received.

II.

That upon a hearing of the motion to suppress the evidence obtained as a result of the search and seizure referred to in the preceding assignment, the defendant offered to prove that the officers searching said room had reasonable grounds to obtain [36] and could reasonably have obtained a search warrant to authorize the said search and the Court erred in refusing said offer and denying defendant an opportunity to make said proof.

III.

That the defendant, Mrs. Ah Fook Chang alias Kam Yuen, petitioned the Court for the suppression, or exclusion, from evidence of a purported confession claimed to have been obtained from her by Federal Narcotic Officers and Police Officers of the City of Hilo on December 19, 1935, illegally and improperly and in violation of her Constitutional rights under the Fourth and Fifth Amendments to

the Constitution of the United States, and the hearing of said petition having been duly held, the Court erred in denying the same and holding and deciding that said confession was a free and voluntary act of the said Mrs. Ah Fook Chang alias Kam Yuen.

IV.

That in the course of the hearing on said motion to suppress said confession and while William K. Wells, Federal Narcotic Agent, was on the witness stand, he being the Federal Officer who had taken said confession, the said defendant, Mrs. Ah Fook Chang alias Kam Yuen, moved the Court to require the production of said confession for the purpose of inspection and for use in the further examination of the said witness and the Court erred in denying and refusing to require the Government to produce said confession at said time and for said purpose and in denying said defendant the right to examine the same.

V.

That on the trial of the above entitled cause, the Court erred in permitting, over the objection and exception of defendants, the introduction in evidence of the property and articles found and seized in connection with the search of the room premises of defendant, Robert Chang alias Yuk Moon, on the said 18th day of December, 1935. [37]

VI.

That the Court erred in admitting in evidence, over the objection and exception of the defendants,

the purported confession of Robert Chang admitted in evidence as U. S. Exhibit "A" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of his mind and memory while in unlawful confinement and by coercion.

VII.

That the Court erred in denying the request of Mrs. Ah Fook Chang alias Kam Yuen that the Court instruct the jury that the statement or confession of the said Robert Chang alias Yuk Moon (U. S. Exhibit "A") could only properly be considered as evidence against him and not as against her.

VIII.

That the Court erred in admitting in evidence, over the objection and exception of the defendants, the purported confession of Mrs. Ah Fook Chang alias Kam Yuen admitted in evidence as U. S. Exhibit "B" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of her mind and memory and while in unlawful confinement and by coercion.

IX.

That the Court erred in denying the request of Robert Chang alias Yuk Moon that the Court instruct the jury that the statement or confession

of the said Mrs. Ah Fook Chang alias Kam Yuen (U. S. Exhibit "B") could only properly be considered as evidence against her and not as against him. [38]

X.

That the plaintiff having rested, defendants offered in evidence the sworn testimony of the defendants given in connection with the motion presented by Mrs. Ah Fook Chang alias Kam Yuen to suppress the statement or confession purported to have been made by her and the Court erred in denying said offer and refusing to allow the evidence to be read to or considered by the jury.

XI.

That the Court erred in giving the Court's charge or instruction (No. 12-a) in that said instruction failed to define the meaning of the word "voluntary", as used in connection with the phrase "free and voluntary confession".

XII.

That the Court erred in refusing to give defendants' requested instruction number one.

XIII.

That the Court erred in refusing to give defendants' requested instruction number two.

XIV.

That the Court erred in refusing to give defendants' requested instruction number three.

XV.

That the Court erred in refusing to give defendants' requested instruction number five.

XVI.

That the Court erred in refusing to give defendants' requested instruction number six.

XVII.

That the Court erred in refusing to give defendants' requested instruction number seven. [39]

XVIII.

That the Court erred in refusing to give defendants' requested instruction number eight.

XIX.

That the Court erred in refusing to give defendants' requested instruction number nine.

XX.

That the Court erred in refusing to give defendants' requested instruction number ten.

XXI.

That the Court erred in denying defendants' motion for a new trial on the grouds set forth in said motion.

WHEREFORE, said defendants pray that the judgment and sentence of the Court herein may be reversed, annulled and held for naught and that the said defendants may be discharged and may

have such other and further relief as may be proper in the premises.

Dated: Honolulu, T. H., March 3, A. D. 1936.

MRS. AH FOOK CHANG alias
KAM YUEN, and
ROBERT CHANG, alias
YUK MOON,
Defendants.

By (s) E. J. BOTTS
Their Attorney.

Receipt of a copy of the foregoing assignment of errors is hereby acknowledged, this 3rd day of Mar., 1936.

(s) WILLSON C. MOORE
Ass't. U. S. District Attorney. [40]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Filed Mar. 7, 1936 at 11 o'clock and 15 minutes a. m. Wm. F. Thompson, Jr., Clerk. By (s) Thos. P. Cummins, Deputy Clerk. [41]

Upon the application of MRS. AH FOOK CHANG alias KAM YUEN, and ROBERT CHANG alias YUK MOON, defendants above named, and upon the motion of their attorney, E. J. BOTTS, ESQUIRE,

IT IS HEREBY ORDERED that the petition for appeal, heretofore filed herein by defendants be and the same is hereby granted and the appeal to the United States Circuit Court of Appeals for

the Ninth Circuit from the judgment, order and sentence herein and heretofore filed, be and the same is hereby allowed and a transcript of the record of all proceedings and papers upon which said judgment, order and sentence was made, duly certified and authenticated, be transmitted, under the seal of the Clerk of this Court, to the United State Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, State of California.

Dated at Honolulu, this 7th day of March, A. D. 1936.

(s) S. C. HUBER
Judge of the above-entitled Court.

Receipt of a copy of the foregoing Order allowing appeal is hereby acknowledged, this 6th day of March, 1936.

(s) WILLSON C. MOORE
Ass't. U. S. District Attorney. [42]

[Title of Court and Cause.]

CITATION ON APPEAL.

The United States of America
The President of the United States—ss.

To the United States of America, and I. M. Stainback, Esquire, Its Attorney: Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of

Appeals for the Ninth Circuit, to be held at the City and County of San Francisco, State of California, within thirty days from the date of this Writ, pursuant to an order allowing appeal, filed in the Clerk's office of the United States District Court in and for the District and Territory of Hawaii, wherein MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG, alias YUK MOON, are appellants and you are appellee, to show cause, if any there be, why judgment, order and sentence in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable CHARLES EVANS HUGHES, Chief Justice of the Supreme Court of the United States of America, this 7th day of March, A. D. 1936.

[Seal] S. C. HUBER
Judge of the above-entitled Court.

Attest:
WM. F. THOMPSON, JR.,
Clerk, U. S. District Court.

Received copy this 6th day of March, 1936.
WILLSON C. MOORE
Ass't. U. S. District Attorney. [44]

[Title of Court and Cause.]

COST BOND.

Filed Mar. 5, 1936 at 3 o'clock and 25 minutes p. m. WM. F. THOMPSON, JR., Clerk. By (s) THOS. P. CUMMINS, Deputy Clerk. [45]

Know all men by these presents:

That we, MRS. AH FOOK CHANG alias KAM YUEN and ROBERT CHANG, alias YUK MOON, as principals, and FONG HING, as surety, are held and firmly bound unto the plaintiff in the above entitled matter in the sum of five hundred dollars ($500.00) to be paid to the said plaintiff, for the payment of which, well and truly to be made to the said plaintiff, we bind ourselves and our respective heirs, executors and administrators firmly by these presents.

The condition of the above obligation is such, that

WHEREAS, the above-named defendants have taken an appeal from the District Court of the United States in and for the District and Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the Judgment, Order and Sentence made, entered and filed in said cause on the 29th day of February, A. D. 1936,

NOW, THEREFORE, if the above-named defendants shall prosecute their said appeal to effect and shall answer all costs, if they fail to make good their appeal, then this obligation shall be void, otherwise to remain in full force and effect. [46]

IN WITNESS WHEREOF, we have hereunto set our hands and seals, this 5th day of March, A. D. 1936.

[Seal] (s) MRS. AH FOOK CHANG
alias KAM YUEN

[Seal] ROBERT CHANG alias
YUK MOON
Principals above named.

[Seal] FONG HING
Surety.

United States of America,
Territory of Hawaii—ss.

FONG HING, being first duly sworn, on oath, deposes and says: That he is the surety on the foregoing bond; that he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and has property situated within the Territory of Hawaii, subject to execution, and that he is worth in property within the Territory aforesaid more than double the amount of the penalty specified in said bond, over and above all of his debts and liabilities and property exempt from execution.

(s) FONG HING

Subscribed and sworn to before me, this 5th day of March, 1936.

[Seal] (s) THOS. P. CUMMINS
Deputy Clerk, U. S. District
Court, District of Hawaii.

The foregoing Bond is approved as to form, amount and sufficiency of surety.

Dated: Honolulu, T. H., this 5th day of March, A. D. 1936.

(s) S. C. HUBER
Judge, U. S. District Court, in and for the District and Territory of Hawaii.

The foregoing Bond is approved as to form.
(s) WILLSON C. MOORE
Ass't. U. S. District Attorney. [47]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

Filed Mar. 18, 1936 at 1 o'clock and 10 minutes P. M. Wm. F. Thompson, Jr., Clerk. By (s) Thos. P. Cummins, Deputy Clerk. [48]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That an indictment was returned against the defendants in the above entitled matter on the 17th day of January, 1936, and thereafter these defendants were duly arraigned in the United States District Court in and for the District and Territory of Hawaii. That prior to the entry of plea in said matter, the defendant, Robert Chang alias Yuk Moon, filed in said court a motion to suppress the evidence obtained against him in a search of his room premises on December

18, 1935, said motion to suppress being in words and figures following, to-wit:

(Title, Court and Cause omitted)

"Comes now ROBERT CHANG, alias YUK MOON, one of the defendants above named, and shows as follows:

I

"That on the 17th day of January, A. D. 1936, an indictment was returned against said defendant and Mrs. Ah Fook Chang, alias Kam Yuen, for an alleged violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1914, as amended by the Act approved May 26, 1922, and known as the Narcotic Import and Export Act, and Section 1, of the Act approved December 17, 1914, as amended, and known as the Harrison Narcotic Act in that on [49] the 18th day of December, 1935, there was seized from defendant at Hilo, Island and County of Hawaii, certain smoking opium more particularly described in said indictment, which said smoking opium belonged to and was in his possession and control.

II.

"That said seizure was made by officers of the United States and Peace Officers of the County of Hawaii following the search of his private room and temporary dwelling in said Hilo and was made without authority or a search warrant or other legal justification for said search.

III.

"That said seizure was illegal for the reason that the same was obtained as a result of the search of defendant's private room occupied by him in a certain boarding house on Maunakea Street in said Hilo, which said room constituted his private home and dwelling, said search having been made without a search warrant or other legal authority.

IV.

"Defendant expects that the said smoking opium so seized as aforesaid will be used against him on the trial of this cause.

"WHEREFORE, defendant moves that an order be entered herein suppressing said evidence and excluding it at the trial of this cause.

"Dated at Honolulu, this 24th day of January, A. D. 1936.

"(Sgd) ROBERT CHANG
alias Yuk Moon
Defendant about named.

"United States of America,
Territory of Hawaii—ss.

"ROBERT CHANG, alias YUK MOON, being first duly sworn, on oath, deposes and says: That he is one of the defendants above named; that he has read the above and foregoing Motion and knows the contents thereof and the things with reference to the search and seizure are correct to his knowledge and belief.

"(Sgd) ROBERT CHANG

"Subscribed and sworn to before me, this 24th day of Jan., 1936.

[Seal] (Sgd) GLADYS K. BENT
Notary Public, First Judicial Circuit, Territory of Hawaii." [50]

That thereafter, to-wit, on the 25th day of January, 1936, plaintiff filed a traverse to said motion to suppress in words and figures following, to-wit:

(Title, Court and Cause omitted.)

"ANSWER TO MOTION TO SUPPRESS EVIDENCE.

"To the Honorable S. C. Huber, Judge of the United States District Court for the Territory of Hawaii.

"Comes now THE UNITED STATES OF AMERICA, Plaintiff herein, by and through INGRAM M. STAINBACK, United States Attorney for the District of Hawaii, and in answer to the Motion to Suppress Evidence filed in the above entitled Court and Cause, respectfully shows unto this Honorable Court as follows:

I.

"Plaintiff admits the Defendants in the above entitled Court and cause were indicated as alleged in Paragraph I of said Motion to Suppress Evidence and that on December 18th, 1935, 24 five tael tins of smoking opium were

seized in Hilo, and are held to be used as evidence against these defendants.

II.

"As to Paragraph II of said Motion Plaintiff admits that the seizure was made by officers of the United States and Police Officers of the County of Hawaii and admits that said search was made without a warrant, but denies that said search was without authority or other legal justification by law.

III.

"That as to the allegations of Paragraph III Plaintiff denies the allegations of said paragraph insofar as they allege an illegal search but as to the other allegations thereof Plaintiff leaves Defendant to his proof.

IV.

"That as to the allegations in Paragraph IV the Defendant ROBERT CHANG alias YUK MOON is correct in that he expects this opium to be used against him in the trial upon the indictment returned in this cause. **[51]**

V.

"That Plaintiff herein alleges that the true facts relating to this search and seizure are as follows: That the Defendant, ROBERT CHANG alias YUK MOON, voluntarily consented to the search which resulted in the

seizure of the twenty-four tins of opium hereinabove mentioned.

"WHEREFORE, Plaintiff prays that the Defendant's Motion to Suppress Evidence be denied and dismissed and that this said Defendant take nothing by said Motion to Suppress Evidence.

"Dated: Honolulu, T. H., January 25th, 1936.

"THE UNITED STATES OF AMERICA

Plaintiff.

"By INGRAM M. STAINBACK,
United States Attorney, District of Hawaii,

"By (Sgd) WILLSON C. MOORE,
Assistant United States Attorney, District of Hawaii.

"United States of America,
District of Hawaii—ss.

"W. K. WELLS, being first duly sworn, on oath, deposes and says:

"That he is an Agent of the Federal Narcotic Department; that he has read the above and foregoing Answer to Motion to Suppress Evidence and that the same to the best of his knowledge, information and belief is true; that the knowledge, information and belief as to such truthfulness is the voluntary statement of

ROBERT CHANG alias YUK MOON, one of the defendants herein.

"(Sgd) W. K. WELLS

Subscribed and sworn to before me this 25th day of January, 1936.

[Seal] (Sgd) THOS. P. CUMMINS,
Deputy Clerk, United States District Court, Territory of Hawaii."

That thereafter, to-wit, on the 30th day of January, 1936, evidence was taken in suport of and in opposition to said motion to suppress and the testimony in this connection is hereby summarized as follows: [52]

DIRECT EVIDENCE IN SUPPORT OF MOTION.

ROBERT CHANG,

defendant, being first duly sworn, testified, on direct examination, that he was twenty-four years old; that he attended school three years, was born on Maui and now lives there. That he quit school in the fifth grade. That he came back from China in 1929 when he was eighteen years old. That he had gone to a Chinese school in China and that upon his return he entered the third grade. That he did not finish the fifth grade in school saying that he "didn't pass that time". He testified that he was in Hilo on December 18th last; that he came there by himself. That on December 18th, he went

(Testimony of Robert Chang.)

to the Maunakea Rooming House on Maunakea Street in Hilo. He went there in the morning about 7 o'clock and rented a room there and after renting the room went out leaving a suitcase in the room behind him. The room had a bed for him to sleep on and he intended to sleep there. When he left the room, he walked around Hilo. He first went down to the park. Asked if during the day officers of the law came to him, he said they did and he said it was about 7 o'clock and getting dark.

Q. And where did they first come to you?

A. I was crossing the street, sir.

Q. Crossing the street?

A. Yes sir.

Q. What street?

A. Right in front of the hotel, sir.

Q. Of Mauna Kea Street?

A. Yes sir.

Q. Were you walking toward the Mauna Kea Rooming House, or away from the Mauna Kea Rooming House?

A. Away.

Q. Away from it?

A. Yes sir.

Q. Did you have anything in your hands?

A. No sir.

Q. Where was this suitcase that you said you had?

A. In the room, sir.

Q. In the room?

A. Yes sir.

(Testimony of Robert Chang.)

Q. Did you have the key to that room?

A. Yes sir.

Q. Where was the key?

A. In my pocket, sir.

Q. How many officers approached you?

A. Three, sir.

Q. Three?

A. Yes sir.

Q. And what happened then?

A. First they called me to come back and they yelled out to me and asked me "Come here, boy", and they said they wanted to search my room.

Q. Did they tell you they were officers?

A. Yes sir, they said they were officers, and they shove me by the steps, they said they want to search my room, and I walk up; they tell me walk up first, and I went up to the room, and they told me, "What room you stay?" I said, "Ten"; they said, "Open the door"; and I scared, and I open the door; they ask me "Open the suitcase", and I open the suitcase. [54]

He said that he opened the door with the key that he had in his pocket when they told him he was under arrest. He said that when he opened the door, the next think they said to him was to open the suitcase.

Q. And did you open the suitcase?

A. Yes sir; I was scared, I open the suitcase and they say I am under arrest.

(Testimony of Robert Chang.)

The suitcase was found to contain a package of opium and there was also another package of opium on the table.

Q. Why was it that you let them in your room like that?

A. They shove me to the steps and they say they are police officers.

Q. And you felt you had to do that?

A. Yes sir.

On cross examination, the defendant repeated that they had shoved him up the steps. He didn't remember which one did this.

"They were on the street; it was dark outside".

He was asked if it wasn't a fact that one of these police officers came up to him and said that he wanted to talk to him, showed his badge and told him he was a police officer and asked him if he might have permission to search his room and that he had replied that he could have such permission, and then voluntarily led them upstairs. The defendant answered this question in the negative. Again he was asked if he did not open the door voluntarily and replied:

"They told me open the door, sir."

Q. In other words, you didn't open the door up there in front of room 10 until they told you to open it, is that right?

A. Yes sir, they told me to open it——

(Testimony of Robert Chang.)

Q. When they got you upstairs in front of this room 10 they told you "Open the door"?

And the defendant said that he opened the door because they told him to.

"I scared and then I opened it."

He was asked if he opened the suitcase because he was scared and he said he did. He was asked if inside the suitcase there was a shoe box wrapped up in Christmas paper and he said there was and then he was asked if this shoe box contained twelve five tael tins of opium.

A. I don't know how many.

Q. You knew there were tins of opium in there?

A. No sir.

Q. You didn't know there was opium there?

Mr. BOTTS: We don't dispute the facts. [54]

Mr. MOORE: You say you don't know that there was any opium in there?

A. They told me——

Q. Yes, but before they told you did you know there was any opium in there?

A. No sir.

Q. You didn't know a thing tbout it?

A. No sir.

Q. And this box on the table was just like the one in your suitcase, is that right?

A. Yes sir.

(Testimony of Robert Chang.)

Q. Wrapped up just the same?

A. Yes sir.

Q. Looked just the same?

A. Yes sir.

Q. And you didn't know what was in that?

A. No sir.

Q. So that when these officers asked you to let them look in your room you didn't know there was any opium in your room at all, is that right?

A. No sir.

Q. And you weren't afraid of anything, were you then?

A. I afraid——

Q. Afraid of what?

A. They were police officers.

Q. Well, what were you afraid of if you didn't have anything in your room that was wrong?

A. They might lick me.

Q. They might lick you?

A. Yes.

Q. It's your idea of a police officer that he's going to take you up in your room and lick you?

A. Yes.

Q. That's the only thing you were afraid of?

A. Yes sir.

(Testimony of Robert Chang.)

Q. You weren't afraid they might find something in your room that was wrong, were you?

A. Beg pardon.

Q. You weren't afraid that they might find something in your room that it was wrong for you to have, were you?

A. Beg pardon; I didn't get you.

Q. You weren't afraid before you went upstairs that they were going to find opium in your room, were you, because you didn't know there was any opium there, isn't that right?

A. Yes sir.

Q. And when you went upstairs the only fear that you had was that they might lick you, is that right?

A. Yes sir.

Q. And you weren't afraid they might find opium?

A. Beg pardon.

Q. Were you afraid before you went upstairs that they might find opium in your room?

A. I didn't get you.

Q. Well, you say you didn't know there was any opium there?

A. Yes.

Q. You had no idea there was any opium there, is that right?

A. Yes.

(Testimony of Robert Chang.)

Q. You didn't know what was in these boxes at all?

A. Yes sir.

And questioned further, he said the only fear he had was that the officers might lick him and reiterated that he didn't know that there was opium in the packages. He was then asked if two days after this opium was found in his room, he was not asked a lot of questions at the Police Station in Hilo. He was asked if he recognized the man sitting [55] in court in a light gray suit and he said he did. And he was then asked if this man had not asked him:

"Did you give the police officers permission to search your room?"

And he said he didn't remember. He was then asked:

Q. Didn't you answer, "I was standing outside on the sidewalk when three men came up to me and one of the men said he was a police officer"; do you remember telling him that?

He said he didn't remember. He was asked if he denied that he said that and he said no. [56]

Q. Do you deny that you said that?

A. No sir.

Q. You don't deny it?

A. What do you mean sir?

Q. Did you tell this man, Mr. Wells here that I just pointed out to you——

(Testimony of Robert Chang.)

A. What do you mean by "deny"?

Q. That means that you didn't say this.

A. Beg your pardon?

Q. Did you say this or didn't you?

A. I think I say that.

Q. And didn't you say this also: "at the same time showing me a badge asked permission to search my room; I said O. K." Did you say that?

A. I don't remember.

Q. Do you deny——

A. That time they want to lick me, that time in the——

Q. Who wanted to lick you? Anybody say they were going to lick you?

A. They was going to hit me in the office.

Q. Who?

A. A tall slim guy with eyeglasses.

Q. "and I took them up to my room, number 10 at Maunakea Rooms; I unlocked the door, I entered the room, followed by three officers"; did you say that?

A. I don't remember that long, sir.

Q. You don't remember whether you did or not?

A. No sir.

Q. And didn't you say "I turned on the lights and opened the suitcase; they found one box containing tins of opium in the suitcase * * *"

A. Yes sir.

(Testimony of Robert Chang.)

Q. "and one box containing tins of opium on the table", did you say that?

A. Yes sir.

He was then shown a paper and asked if he had written the name Robert Chang on it and he said he did in Hilo December 20th.

"They told me sign my name."

Q. And Mr. Wells read this to you, and you read it, didn't you, before you signed it?

A. They told me to read it and they told me to sign it.

Q. And you read it and signed it?

A. They told me to sign it and I signed it.

This paper signed by the defendant was put in evidence as U. S. Exhibit "A" in connection with the motion.

On

Redirect Examination,

he said that the packages the officers found were those he put in his room at 7 o'clock in the morning. [57]

Q. And that was opium—well, you knew as a matter of fact that that was opium, didn't you; you knew this was opium didn't you?

A. Yes sir.

Q. So when these officers came up to you and asked to search your room, you knew that you had opium in there, isn't that correct?

A. Yes sir.

The Court questioned the witness as to his schooling and he said he came back from China in 1929 where he had been for seven years and three years

(Testimony of Robert Chang.)

of that time he was in a Chinese school. That before going to China, he had gone to public schools on Maui until he reached the third grade, following which he went to China. On his return he completed the third grade and fourth grade. He was asked:

Q. You completed the third grade and the fourth grade?

A. Yes sir.

Q. How many months did you go the year you were in the 5th grade?

A. I didn't pass, so I didn't go to school; that's why I quit.

Q. (Moore) That is, did you finish the 5th grade or go through the whole school year in the 5th grade and fail to pass the 6th grade, is that right?

A. No, I didn't pass the 6th grade.

Q. Yes, but you finished the school year, you went to school that whole year?

A. Until vacation.

Q. Until vacation time in the Summer, is that right?

A. Yes sir.

Q. But you failed to pass the 6th grade and then you quit school?

A. Yes sir.

Defendant having rested,

LEE A PEARSON

was called as the first witness for the plaintiff and was sworn and testified that he was stationed in Hilo, Hawaii, and was an investigator, Alcohol Tax Unit, Internal Revenue Service. He was in Hilo on December 18th and on that day assisted in the search of room 10 of the Maunakea Rooming House, being the room occupied by Robert Chang. He said that about 7 o'clock on December 18th, he, with police officers Pacheco and Takemoto, saw Robert Chang leaving the Maunakea Rooming House and he was just getting on Kilauea Avenue in front of the rooming house when police officer Takemoto stopped him and told him that "we wanted to see him". Chang came back to where the officers were on the sidewalk; that Takemoto showed him his badge, said he was a police officer and wanted permission to search his room. That defendant, said [58] "O. K., Come on up". That Chang led the way to the back of the building where the stairway went up, leading the way upstairs, walked right over to room 10, stopped, put his hand in his pocket, took out the key, opened the door, went in and turned on the light saying "Come in". The officers walked in and found a suitcase lying on the floor. The witness asked him what was in the suitcase and defendant said "Look see". The witness asked him "Open it up, if you will?" and defendant reached down and just lifted the cover; in there was a package wrapped in Christmas paper. The

(Testimony of Lee A. Pearson.)

witness took the package and opened it on the bed and found it contained twelve tins of opium. That Takemoto gave the witness a package similarly wrapped that had been on the table nearby and unwrapping this found it contained twelve tins of opium. That nobody threatened the defendant and there was no display of anything that could be called a threat.

On

Cross Examination

the witness was asked if Antone Pacheco was not with them and he said he was and the following proceedings occurred:

Q. As I understand, the facts are these; that about 5 o'clock in the evening of the day in question you and Pacheco and Takemoto of the Hilo Police began an investigation of this matter?

Mr. MOORE: I object, may it please the Court, to any investigation; we're talking about this search——

Mr. BOTTS: This investigation would show, Your Honor, what they did; that's what it's intended to bring out.

Mr. MOORE: We're showing what's just before and during the search, Your Honor; we're not on a fishing expedition.

Mr. BOTTS: There's no fishing expedition, by any manner, shape or means.

(Testimony of Lee A. Pearson.)

The COURT: We can't try the main case now.

Mr. BOTTS: I'm not attempting to; it's just the search and the immediate steps leading up to the search.

The COURT: Your witness has testified, and so has this witness, that at 7 o'clock they went to this place.

Mr. BOTTS: Yes. Now we're going to show that they began their details on this case at 5 o'clock, and followed the last witness Robert Chang and his mother to different places in Hilo, and it ultimately culminated in their apprehending Chang and gaining entrance to his room.

The COURT: But, assuming they had followed him from the time he left there at 7 o'clock in the morning, as he testified he did, how would that throw any light on the facts surrounding this immediate search? [59]

Mr. BOTTS: It's very material, if Your Honor pleases——

The COURT: The Court doesn't see it.

Mr. BOTTS: If these investigators were investigating, as I'm prepared to show they were in this case, there were certain things that properly should have been done. Now we offer to prove by this witness that he, with the officers I have named, Antone Pacheco and Takemoto, at 5 o'clock on the evening in ques-

(Testimony of Lee A. Pearson.)

tion were detailed to this case; that they saw Robert Chang's mother and Robert Chang himself coming out of the Hawaii Meat Market on Kamehameha Avenue and get on a bus and go down to Kress store on Kamehameha Avenue—that's about 1,000 feet from where they got on; these officers followed Mrs. Chang and her son in another machine; he will testify that as they approached the Kress store Mrs. Chang, with a baby in her arms, and Robert got off the machine and walked toward the Hilo Electric building, and these officers followed them. They shadowed their movements, in other words, from 5 o'clock to 7 o'clock, and then, at the moment they thought was auspicious, approached Robert Chang and demanded of him permission to search his room.

Mr. MOORE: We object, may it please the court; it's got nothing to do with the request for permission to search the room.

The COURT: Yes; the Court doesn't see the materiality of what happened prior to the time they contacted this defendant.

Mr. BOTTS: Will Your Honor consider that as an offer of proof?

The COURT: It may so be considered.

Mr. BOTTS: And will Your Honor rule on it?

The COURT: Yes. The offer is not admitted.

(Exception No. 1). To which ruling of the Court the defendant duly excepted and his exception was duly allowed.

The witness was then asked if he knew Norman Godbold in Hilo who is United States Commissioner there and he said he did. Asked if he did not from time to time apply to him for search warrants and he said he did and that Mr. Godbold was Commissioner on December 18th.

R. TAKEMOTO

was the second witness called by the plaintiff and being duly sworn testified that he is a police officer of the South Hilo Police Department and was such an officer on December 18th, 1935, and on that day he saw defendant, Robert Chang, around 7 o'clock in the evening. That he saw him in front of the Maunakea Rooming House about to cross the street. Asked what took place he said: [60]

> A. I saw he was trying to cross the street, coming out from Mauna Kea Rooming House, and Mr. Pearson, Mr. Pacheco, and myself went there and told him, "Say boy", called him back, and I asked him—I told him that we were police officers, that we wanted "to look in your room, can you give us permission to go in your room"; he says, "O. K.", then he led us to his room, it was room number 10; then he pulled out the key from his pocket, opened the door, turned the light on, and told us, "Go ahead and look around".

(Testimony of R. Takemoto.)

He said nobody threatened defendant at any time and corroborated the witness Pearson's testimony with reference to the things found in the room.

Q. Did you threaten him, or did anybody else threaten him in any way?

A. No, nobody.

Q. At any time?

A. No.

Q. And not at any time during this search?

A. No.

On

On

Cross Examination

the following proceedings occurred:

Q. What was the first time, during the day that you saw either Robert Chang or his mother?

Mr. MOORE: I object to this, may it please the Court, as this is an attempt on behalf of counsel to get what the offer of proof just made that was denied. We're talking about 7 o'clock here.

Mr. BOTTS: We have a right to go into the antecedents of this search.

The COURT: You are, if it pertains to the search; but if it's a fishing expedition on your main case you're not.

Mr. BOTTS: We're not concerned with the main case; we're concerned here, Your Honor, with whether they had reasonable cause to apply for a search warrant. I expect to show

(Testimony of R. Takemoto.)

by this witness that they had this boy under surveillance for two hours, and I offer to show that.

Mr. MOORE: Then, may it please the Court, it is not proper for counsel to show or make out a case on cross-examination. I have no objection to him cross-examining this man to his heart's content about this search, but to go in and say he makes an offer of proof to show this, that and the other—let him put him on as his witness, and not on cross-examination.

Mr. BOTTS: We're not, Your Honor. They don't ordinarily stop a man on the street and say [61] "We want to search your room" unless there's some cause for it. Now, he says they apparently stopped this man in the lawful exercise of his right crossing the street at 7 o'clock in the evening. I submit to Your Honor that under the circumstances revealed by this direct examination we have an absolute right to inquire into the history of this situation, the matters that led up to the stopping of this man on the street; and I except to Your Honor's ruling. [63]

Mr. MOORE: May it please the Court, this man has brought a motion to suppress the evidence here, and he has set forth, so far as this witness is concerned, for which officer he closed his case, that this boy was intimidated or forced

(Testimony of R. Takemoto.)

against his will to open this door, and we're rebutting that by our answer here and putting on proof. To go around in circles here on something he says he's going to prove, that if he was going to prove anything like that the time for him to prove it is on his case in chief and call his witnesses for it. To come in here and attempt to drag in on cross-examination things that have nothing to do with this particular search, under a guise of cross-examination, we submit is absolutely improper, and we object to it.

The COURT: It seems to the Court that the issue in this motion is narrowed to very definite limits. The petition itself sets out that the search was unlawful in that this man's private room was invaded without a search warrant or lawful authority. In the answer the Government sets up that the search was made with the consent of the defendant—consent voluntarily given; and that is traversed by the traverse filed by the defendant, which alleges, as the Court now recalls it, that the search was not acquiesced in by him but virtually that he was coerced into permitting the search; in other words, that he was compelled by the officers to submit to this search. Any evidence bearing upon that question will be gladly received.

Mr. MOORE: To which we have no obpections whatsoever.

(Testimony of R. Takemoto.)

Mr. BOTTS: We offer to prove, if Your Honor pleases, by this witness that, on or about 5 o'clock in the afternoon of the day in question, this witness and his associates, the officers, had information that reasonably led them to believe that this defendant Robert Chang had opium in his possession secreted in the room in the Mauna Kea boarding house; that they were acting upon this information which reasonably tended to establish that as a matter of law, and that they followed these defendants for two hours, from 5 o'clock in the afternoon until 7 o'clock, when they finally stopped Robert Chang. And what happened after that has been related in the evidence.

Mr. MOORE: We object to the offer as being incompetent, irrelevant and immaterial, and as having no bearing upon the issues of this case, on the matter now before the Court.

The COURT: In the view of the Court, an officer might keep a suspected person under surveillance on mere suspicion but he could not possibly apply for a search warrant on that suspicion. [63]

Mr. BOTTS: I wasn't dealing with suspicion, Your Honor; I was dealing with reasonable cause to believe, as a legal proposition, that these people had opium—that this man had opium; not mere suspicion, they had definite facts. Will Your Honor rule on the offer?

(Testimony of R. Takemoto.)

The COURT: Yes. The evidence will not be admitted.

(Exception No. 2). To which said ruling of the Court, the defendant duly excepted and his exception was duly allowed.

The third witness called for the plaintiff was

WM. K. WELLS,

Federal Narcotic Agent stationed in Honolulu, who testified that on December 20th, he was on the Island of Hawaii and on that day took a statement from Robert Chang with reference to the search of his room. He identified plaintiff's Exhibit "A" and Mr. Wells said that he had questioned the defendant with reference to this statement. That after it was typewritten, the witness read it to defendant and then asked defendant to read it; that defendant read it and handed back the copies to the witness who then asked him if it was correct and he said "Yes" and then asked:

"Do you mind signing it?"

And he said the defendant said "Yes" and he signed it.

On

Cross Examination

Mr. Wells said that he was not present at the time of the search and that he had talked to defendant in English without an interpreter.

The foregoing is a complete narrative of the testimony given in connection with the motion to

suppress the evidence obtained in searching the room of the defendant, Robert Chang, in the Maunakea Rooming House on December 18, 1935.

(Exception No. 3). That the matter being duly submitted to the court, the Court did thereafter overrule and deny said motion, to the overruling and denial of which defendant duly excepted and his exception was duly allowed. [64]

MOTION TO SUPPRESS CONFESSION.

That thereafter on, to-wit, the 14th day of February, 1936, and prior to the trial hereof, the defendant, Mrs. Ah Fook Chang, alias Kam Yuen, duly filed in the trial court a motion to suppress a confession purported to have been taken from her on or about December 19th, 1935, which said motion is in words and figures following, viz:

(Title, Court and Cause Omitted.)

"MOTION TO SUPPRESS EVIDENCE.

"Come now MRS. AH FOOK CHANG, alias KAM YUEN, one of the defendants above named, and shows as follows:

I.

"That on the 17th day of January, A. D. 1936, an indictment was returned against said defendant and Robert Chang, alias Yuk Moon, for an alleged violation of the Act of February 9, 1909, as amended by the Act approved January 17, 1914, as amended by the Act approved May 26, 1922, and known as the Narcotic Im-

port and Export Act, and Section 1 of the Act approved December 17, 1914, as amended, and known as the Harrison Narcotic Act, in that on the 18th day of December, 1935, there was seized from defendant, Robert Chang, alias Yuk Moon, at Hilo, Island and County of Hawaii, certain smoking opium more particularly described in said indictment, which said smoking opium belonged to and was in the possession and control of said Robert Chang, alias Yuk Moon.

II.

"That said seizure was made by officers of the United States and Peace Officers of the County of Hawaii and, following said seizure, movant was arrested and charged jointly with the said Robert Chang, alias Yuk Moon, with said narcotic offense.

III.

"That movant was taken in custody at approximately 7 o'clock P. M. of said 18th day of December, 1935, and, without warrant or process of any kind, she was held a prisoner by Federal officers and peace officers of Hilo until approximately 9 o'clock A. M. of December 20th, 1935, a period of thirty-eight hours, when she was brought before the United States Commissioner at said Hilo and charged. That [65] movant was taken to jail with her child, an infant in arms whom she is still nursing. That on or about 2 o'clock P. M. on the following

day, i. e. December 19th, 1935, notwithstanding that she had not been brought before the United States Commissioner or other magistrate to be charged, she, with her infant child, was conducted into a room or office and there subjected to a tortuous examinaiton by Federal officers and peace officers of Hilo, in the course of which she was repeatedly informed that the inquisition would not cease, and she would not be permitted to rest with her baby, unless she signed a paper writing purporting to be a con-confession of her claimed complicity in connection with the opium seized from the said Robert Chang, alias Yuk Moon. That the interrogation continued throughout the entire afternoon and evening of said 19th day of December, 1935, when finally, at approximately midnight on said day, movant, completely exhausted by the ordeal and in great distress and apprehension over her plight and the condition of her child, affixed her signature to said paper writing to put an end to the torture of further accusatory proceedings by said officers. That during the afternoon and evening of said 19th day of December, 1935, movant had been wholly unable to take food of any kind because of her suffering and her mental condition of worry and fear, occasioned by the conduct of said Federal and peace officers aforesaid, and in consequence thereof, she was unable to nurse her child, her breasts being without the custo-

mary milk and the child, hungry and distressed and almost constantly crying in its plea for nourishment, caused movant frantically and without thought of self, to accede to the demands of said officers and to sign the paper writing desired by them. That movant is a person of the Chinese race with only a meager education and with only an imperfect understanding of the English language.

"That movant is informed and believes and alleges the fact to be that upon her trial in the above entitled matter the government intends to offer said paper writing in evidence and movant makes this motion in advance of the trial for the suppression of said paper writing on the ground that the same was obtained from her illegally and improperly and in violation of her constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America.

"WHEREFORE, movant moves that an order be entered herein suppressing said paper writing and excluding it from the evidence on the trial of the above entitled cause. [66]

"Dated at Honolulu, this 14th day of February, A. D. 1936.

(Sgd) MRS. AH FOOK CHANG
Alias Kam Yuen,
Defendant above named.

"United States of America,
Territory of Hawaii—ss.

"Comes now MRS. AH FOOK CHANG, alias KAM YUEN, and being first duly sworn, on oath, deposes and says: That she is one of the defendants above named and movant herein; that she has heard read and explained to her the foregoing Motion to Suppress Evidence and knows the contents thereof and that the same is true, except as to the matters and things alleged on information and belief, and as to these she believes it true.

(Sgd) MRS. AH FOOK CHANG

Subscribed and sworn to before me, this 14th day of Feb., 1936.

[Seal] (Sgd) GLADYS K. BENT
Notary Public, First Judicial Circuit, Territory of Hawaii."

That thereafter, to-wit, the 15th day of February, 1936, the plaintiff filed in said cause a traverse to said motion to suppress, which is in words and figures following, viz:

(Title, Court and Cause Omitted.)

"ANSWER TO MOTION TO SUPPRESS EVIDENCE

"To the Honorable S. C. Huber, Judge of The United States District Court for the Territory of Hawaii:

"Comes now THE UNITED STATES OF AMERICA, Plaintiff herein, by and through

Ingram M. Stainback, United States Attorney for the District of Hawaii, and in answer to the Motion to Suppress Evidence filed in the above entitled Court and cause on behalf of MRS. AH FOOK CHANG, alias KAM YUEN, one of the defendants above named, respectfully shows unto the Court as follows:

I.

"Plaintiff admits the allegations in Paragraph I of said Motion to Supress Evidence except in so far as it alleges that the smoking opium belonged to ROBERT CHANG alias YUK MOON, and as to that allegation plaintiff leaves petitioner to her prof; [67]

II.

"Plantiff admits allegations of Paragraph II of said Motion to Suppress Evidence;

III.

"Plaintiff denies each and every, all and singular, the allegations contained in Paragraph III of said Motion to Suppress Evidence and upon information and belief alleges that the true facts are as follows:

"That at about 7 P. M. on the 18th day of December, 1935, ROBERT CHANG, alias YUK MOON, one of the defendants herein, was found in possession of twenty-four tins of smoking opium at Hilo, County and Island of Hawaii, Territory of Hawaii, and was arrested by the peace officers of South Hilo and booked

at the police station in South Hilo for investigation; that shortly thereafter MRS. AH FOOK CHANG alias KAM YUEN, the petitioner herein, was picked up and booked at the South Hilo police station for investigation by the peace officers of South Hilo; that during the time both of these defendants were booked for investigation, and on the 19th day of December, 1935, they were questioned with reference to the twenty-four tins of smoking opium seized from the possession of the above ROBERT CHANG alias YUK MOON; that at no time during said questioning were the defendants in any way intimidated, threatened, or did the peace officers of South Hilo or the federal officers who were present at the questioning state to this petitioner that they "would not cease questioning her, and she would not be permitted to rest with her baby, unless she signed a paper writing purporting to be a confession of her claimed complicity in connection with the opium seized from the said ROBERT CHANG alias YUK MOON"; that while questioning the said ROBERT CHANG alias YUK MOON the petitioner herein was present when he admitted how he happened to transport this opium to Hilo and from whom he had obtained it; that the petitioner, who is ROBERT CHANG alias YUK MOON's mother, stated at that time that what ROBERT CHANG alias YUK MOON had admitted was correct; that thereupon a written statement was taken from ROBERT CHANG alias YUK MOON and after reading and sign-

ing the same a written statement was taken from MRS. AH FOOK CHANG alias KAM YUEN, the petitioner herein, during the course of which she repeatedly requested the officers to help her boy, and in reply thereto she was informed that the Government could make no promise in that regard; that during the entire examination of the petitioner [68] herein she was not threatened in any way, shape, or form, and the thing that seemed to mainly interest her was an endeavor to get the officers to promise not to prosecute her son; that the statement made by MRS. AH FOOK CHANG alias KAM YUEN, which is intended to be used as evidence in this case, was free and voluntary, and with no promise of immunity or hope of reward.

"WHEREFORE, Plaintiff prays that the Defendant's Motion to Suppress Evidence be denied and dismissed and that said Defendant take nothing by said Motion to Suppress Evidence.

"Dated: Honolulu, T. H., February 15, 1936.

"THE UNITED STATES OF AMERICA,

Plaintiff.

"By INGRAM M. STAINBACK
United States Attorney, District of Hawaii,

"By (Sgd) WILLSON C. MOORE
Ass't. United States Attorney District of Hawaii.

"United States of America,
District of Hawaii—ss.

"WILLIAM K. WELLS, being first duly sworn, on oath deposes and says:

"That he is a Federal Narcotic Agent; that he was present at the questioning of the petitioner herein as set for in the above and foregoing Answer to Motion to Suppress Evidence and that the matters and things therein contained are true to the best of his knowledge, information and belief.

"(Sgd) WILLIAM K. WELLS

Subscribed and sworn to before me, this 15th day of February, 1936.

[Seal] (Sgd) THOS. P. CUMMINS
Deputy Clerk, United States District Court, Territory of Hawaii. [69]

That said motion to suppress the evidence being at issue, the matter came up for hearing on February 17, 1936, and the following proceedings were had:

MRS. AH FOOK CHANG

being called and sworn, testified on her own behalf as follows:

She testified she was forty-five years old; born on the Island of Kauai, Territory of Hawaii, and has lived in the Territory since birth with the exception of a short trip. That she went to school for a period of almost four years.

(Testimony of Mrs. Ah Fook Chang.)

Q. Have you learned to read and write English?

A. I learned very little, not much.

She testified the baby she had with her in court was fifteen months old and that she was nursing the baby with her breasts and that she lives in Wailuku, Maui, where she has five more small children under age, ranging from seventeen to six years old. That her husband's name is Chang Ah Fook, who lives in Wailuku. Said he doesn't do anything because he is old and has a rupture. That Robert Chang is her boy, her third-born child. That Robert is twenty-five years old. That she and Robert were in Hilo on December 18th, 1935. That they arrived on the Waialeale or Hualali, didn't know which. That they reached Hilo in the morning. That that night police officers locked her up about 7 o'clock in the evening. That they arrested her when she "in one store drinking soda water with my baby". Said that while she was in the store: "One Portuguese man came; I was sitting down; he come tell, 'Come here'; I just look at him; I was so frightened I didn't know what's the matter; and he just grab; then I stood up, hold my baby; he just grab my hand and pull me across the street; I didn't know why he take me." That there was another officer across the street waiting, whom she described as a "half [70] white." That they took her to her son Robert Chang's room in the Maunakea Rooming House. She had never been there before. This was the room she understood the boy

(Testimony of Mrs. Ah Fook Chang.)
rented that day. When she got there, the boy was sitting on the bed and she thought there were three police officers in there with him.

Q. What did they do after that?

A. When I went over there I see these two boxes open already; they was show me, he said, "You see this?" I said, "I don't know"; he said, "Do you know anything about this?" I said, "I don't know"; thats all what I know.

Q. Then what did they do?

A. Then they said "Well, come on, get in the car, and we'll lock you up tonight."

Asked what happened then, she said: "They take me to the calaboose house". First, however, they took her to her hotel to get her suitcase. Afterwards she was locked up in jail and the infant with her. Said they did not ask her any questions that night, nor did they take her before a judge or commissioner. That they didn't give her anything to eat in jail that night; she had had something to eat about six o'clock that evening. Stayed with her baby in jail all night and the next morning, she said: "They give me a little pork with a little rice, and some kind of fish, but I didn't eat much, though."

Q. Why not?

A. Because I worry about my baby, I couldn't sleep that night,—

(Testimony of Mrs. Ah Fook Chang.)

The next morning they didn't take her before a judge or commissioner and when lunch time came, she said:

A. They gave me the same thing; then I could not eat and I don't eat, and my baby get no more milk to drink.

Q. You were nursing him with your breasts?

A. Yes.

Q. What did your baby do?

A. She cry little bit, and I had some cookies that I bought for her to eat. [71]

She said that Thursday afternoon, about 2 o'clock, they took her down to the Police Station and they told her to sit down in a room, which she described as having a counter "and they had policemen telephone there."

She said she had not seen Robert Chang from the time she was arrested up to this time. That he wasn't with her and she couldn't talk to him and he couldn't talk to her.

Q. Did you ask them to do anything, in the way of letting you get word to your family?

A. Thursday night I ask, I want to telephone, they won't let me; that night I want to telephone to let my folks know, Thursday night, the same night, but they won't let me to telephone.

(Testimony of Mrs. Ah Fook Chang.)

She said she sat down in the place designated and waited.

Q. All right, what happened?

A. After Robert *pau* (finished)—that time after Robert questioned they took Robert for kaukau (meal) that time.

She said she sat in this place without being asked any questions.

Q. How long did you wait there?

A. I wait there 7 o'clock, and after 7 went in the room.

Q. You say you sat there from 2 to 7 and they didn't ask you any questions at all?

A. No; they ask Robert first.

Q. I'm asking you, did they ask you any questions?

A. No, they didn't ask me questions.

She was asked what happened at dinner and said that they offered to take her back to the "calaboose house" but she said she didn't want to eat and they asked her why and she told them "because I am worry my baby". That she had no dinner. That up to 6 o'clock they had not taken her before a judge or commissioner nor given her an opportunity to make bond, or charged her with any offense. At 7 o'clock they took her in a room next door in which there were four or five policemen and she was questioned.

Q. Who asked the questions, do you know?

A. I cannot tell, I don't know.

(Testimony of Mrs. Ah Fook Chang.)

Q. Well, don't say unless you know. Do you know?

A. I don't know which one ask me, I cannot remember which one ask me, because this one ask me, and this one ask me,—I don't know.

Q. They were all asking you questions? [72]

A. Yes; they didn't give me chance; I was so worried about my baby, I was so worried about my baby.

Q. Four or five of them kept asking questions?

A. Yes.

The questions concerned her knowledge of the opium which had been seized. She denied that she knew anything about it. She said they continued questioning her until about 8 o'clock and "by and by they bring my boy in the same room with me." Said they talked in a loud voice. She next fixed the hour that they brought the boy in as 9 o'clock and he remained in the room until the questioning was over.

Q. What did they say to you?

A. They ask me if I know this, and I said I don't know; they said, "You know, you have to tell, otherwise you stay in jail"; and I said, "I want to telephone"; they said, "No, no, you have to tell everything, then you can go outside, otherwise we won't let you telephone, we won't let you go to sleep."

(Testimony of Mrs. Ah Fook Chang.)

She said they said this to her "plenty times".

Q. They said they wouldn't let you go to sleep?

A. Yes, wouldn't let me go to sleep unless I have to tell everything, then I go to sleep.

Q. Did they say anything about your boy?

A. They said if I tell then easy for my boy and easy for me to go out; and I ask them if I can go up that night sleep with my baby some place; they said, "Sure, if you tell I let you go telephone"; I said, "I want to telephone to my husband, nobody knows where I am, you see."

Q. Did they say they would let you telephone to your husband?

A. They won't let me.

Q. I mean, did they say if you signed a paper——

A. Yes, if I sign paper.

Q. Did you, sometime that night, sign a paper?

A. They make me.

She said she signed the paper between half past eleven and midnight.

Q. Between half past 11 and midnight you signed a paper? [73]

A. Yes, because I worry I cannot get out with my baby; I didn't eat no food that evening and my baby get no more milk to drink,

(Testimony of Mrs. Ah Fook Chang.)

I worried about my baby; he said, "We let you go out if you sign the paper, it's easier for you."

She was asked if she read the paper over and she said she didn't know. "I forgot all bout it now." She said after she signed the paper, they took her back to jail again; did not take her before a judge or commissioner. That she and her baby spent the night in jail where she had spent the previous night. Next morning, about 9 o'clock, wasn't sure whether it was 9 or 10 o'clock, they took her to the Police Station and finally before a judge. That a bond was arranged for her and she was released. She was asked if Robert signed a paper relating to the opium and said:

A. I see my boy, we both in the same room; he make me to sign and make him to sign at the same time.

Q. Did you know what your boy signed?

A. He signed the paper, but I don't know what it says in the paper.

The paper she signed was typewritten and was one, two or three pages; she didn't know, explaining.

A. * * * I don't know; good many pages; I haven't got my mind to count those things; I was worried for myself to get place to rest because from Wednesday night to Thursday night I didn't rest good.

(Testimony of Mrs. Ah Fook Chang.)

Q. You signed this paper simply so you could get some rest?

A. Yes, I wanted to get some rest for my baby; my baby was on my arms all night; it was cold and raining over there.

Q. Except for those facts you wouldn't have signed the paper?

A. If I didn't sign the paper I wouldn't go to sleep.

Q. That's why you signed the paper?

A. Yes.

Q. If they had let you go to sleep you wouldn't have signed the paper?

A. I wouldn't have signed.

Q. You denied you had anything to do with the opium transaction?

A. I said, "I got nothing to do with this transaction." [74]

Q. Finally, on the second day, when your baby was cold and sick, you signed the paper?

A. Yes, for my baby's sake I do anything, because my baby never have enough breast that Wednesday night and Thursday.

She was asked if they told her that if she signed the paper they would fix her up so she could get out of jail and she said that they said "so you can go home sleep and get free".

Q. Can you use their own language that they used?

(Testimony of Mrs. Ah Fook Chang.)

A. I forgot all they tell me; they talk loud; one talk, and another come talk; and I cannot remember.

Q. How did it affect you, all these people asking questions in a loud voice?

A. One ask, and another ask; all puzzled up; I don't know.

On cross examination the witness said her father and mother were Japanese; that she was raised by a Chinese and Hawaiian mother, but her nationality is not Chinese. That her "Chinese father raised her up". That the baby with her is fifteen months old. That she took the baby to Hilo with her because she is nursing the baby and has to take it with her. That the baby is not weaned. She was drinking soda water when she was picked up December 18th. That a Portuguese man took hold of her arm and dragged her across the street, handling her rough. She identified Antone Pacheco, present in court, as the officer. Said they took her to Robert Chang's room where the opium packages were open. That she told the officers she didn't know what the packages were, then they took her to the Police Station, to the booking desk, then to the "calaboose house". They didn't question her that night or the next morning. That they brought her food in the morning describing it as "that small pan of kaukau", which was composed of rice, and some kind of fish. She said she just ate a little bit.

(Testimony of Mrs. Ah Fook Chang.)
That they gave her the same food for lunch. In the afternoon they took her to the Police [75] Station again but didn't question her in the afternoon. That they had her boy in another room. That in the evening her son went back to jail for his evening meal, but she didn't. "I don't want that kind kaukau". She was asked if the police didn't send out and get her just exactly what she wanted in the way of food and she said "no". That they brought her rice and "that kind of fish". That she was asked again if they didn't go out and get the food she wanted ordered and she said "I pay my own money for my biscuits for my baby". That they did not bring a regular dinner for her.

William Martin, Captain of the Hilo police was called in the courtroom and she recognized this policeman and said she had sent him to "buy cookies, not kaukau". After dinner she said they took her and her boy into a room. William K. Wells, Narcotic Agent, and George Richardson, Inspector of Police of Hilo, were brought into the courtroom for identification and she was asked if these two men did not question her on the night of December 19th. She indicated they had but that there were "some more yet". She was asked if it wasn't a fact that while they were in a room together, she kept telling her boy "tell them the truth", and she answered "They ask me for tell the truth. They tell me for tell the truth for I go

(Testimony of Mrs. Ah Fook Chang.)
out. I said 'I don't know anything.' They said 'You tell, I give you free and your boy go out.' "

Q. Didn't you tell the boy to tell the truth?

A. I don't know; I forgot.

She was then asked if she hadn't asked Mr. Wells that if she told the truth he would help her boy and she said "No, I don't know".

Q. Didn't Mr. Wells tell you that he couldn't promise you anything? [76]

A. I didn't ask him.

Q. You say, all the time your baby was crying?

A. Yes, she was crying.

Q. Crying and fussing? You understand what I mean by fussing—fretful?

A. Yes, she was fussing.

Q. And that's all afternoon and all this evening in the nighttime?

A. Yes.

Said she requested permission to telephone her husband and identified George Richardson as the one to whom the request was made.

Q. They didn't threaten you in any way; didn't offer to hit you, or anything like that?

A. They just tell me to tell—"hurry up, hurry up"; everyone ask me, I don't know what I'm going to do, each one ask me questions, I was so excited, I didn't know what to

(Testimony of Mrs. Ah Fook Chang.)

do; and they told me, they said "If you tell, I give you place to sleep tonight and you get out."

She was asked again if she had told her boy to tell the truth and she said she didn't know; she had forgotten.

Q. While they were questioning you there that night there was a man took this down on the typewriter, is that right, right inside the room?

A. Yes.

Q. And when they got pau writing this, first they read you this paper, didn't they, is that right?

A. I don't know.

Q. Well, didn't they read you this paper?

A. They read to me, but I didn't know what they read to me.

Q. And they read the paper to your boy before he signed it?

A. I don't know; I forgot.

Q. Then they gave you the paper to read before you signed it?

A. They tell me to sign it.

That she had forgotten whether they had given her the paper to read or not. That they had questioned her from 7 o'clock to half past eleven, almost twelve. Asked if it wasn't a fact that on the night

(Testimony of Mrs. Ah Fook Chang.)
of December 19th her boy was first questioned and signed his statement first: [77]

Q. But they were questioning your boy, weren't they?

A. They question my boy and question me, but I don't know what they ask me, and I don't know what I said.

She didn't remember whether the boy signed the paper first or not.

A. I don't remember who sign first; I know they told me sign for I can get free, that's all I know; I'm anxious to get rest and get out.

She answered she didn't know a thing they said to her or a question they asked.

Q. Did they tell you that you couldn't rest with your baby unless you signed?

A. They tell me when I sign then I can go out rest and sleep; if I won't sign——

Q. You asked them to rest?

A. I asked, I want to go home sleep.

Q. Whom did you tell that to?

A. I told some of the police if they got beds around there to rest,——
(interruption).

She was then asked if when she was taken to the boy's room she had been shown something and asked if she knew anything about it and she answered in

(Testimony of Mrs. Ah Fook Chang.)
the affirmative and that she told them she didn't know anything about it.

Q. Did you know what it was that they showed you?

A. Opium.

Q. You knew it was opium?

A. I didn't know the boy take opium.

Q. You knew that that was opium?

A. The policeman poked a needle into it; he showed me that, but I didn't know.

Referring to the motion to suppress, counsel reminded the witness that that paper said they had asked her questions all afternoon and she answered:

A. Outside they ask me; policemen one by one come ask me those things, but I said I don't know. [78]

She explained that it was in the evening that they took her in the room where the questioning took place. She reiterated that from 2 o'clock until dinner time they had asked her a few questions, the questions were asked by "some of these police".

Q. Did anybody tell you if you didn't do anything they would hurt you, anything like that?

A. Yes; they said if I didn't do what they tell me they lock me up and I got to stay in jail and my boy got to stay in jail 25 years; they told me that.

(Testimony of Mrs. Ah Fook Chang.)

Q. Did they offer to hit you or lick you, or anything like that?

A. Not to me, they never said to lick me.

Q. Did they do anything like that to your boy?

A. They did to my boy; the first afternoon only my boy they ask.

On redirect she said she had never been to Hilo before.

ROBERT CHANG,

next witness called in support of the motion, being sworn testified as follows:

That he is the son of Mrs. Ah Fook Chang, twenty-four years old, lives in Wailuku, Maui and that he quit school when he was in the fifth grade. That he spent seven years in China coming back here in 1929. He was asked with reference to being arrested in Hilo December 18th. Asked where they took him after he left his room in the Maunakea Rooming House, said they took him to jail and locked him up and he stayed there two nights until Friday morning. That he was released some time before twelve o'clock on that day. Said Thursday night they took him in a room where his mother was and asked him questions. That he thought the questioning was over about twelve o'clock that night.

Q. And you signed a paper?

A. They make me sign a paper; they told me sign a paper.

(Testimony of Robert Chang.)

That he thought he signed this paper about 10 or 11 o'clock. He was asked if he thought his mother signed a paper and he said he didn't remember. Asked if he saw them questioning his mother, [79] he answered in the affirmative and said there were four or five police officers there. Said they told his mother to tell the truth then they can let her go.

Q. What else did they say?

A. And he say, "If you tell everything we let you go out", and this and that, "otherwise you stay in here, we won't let you go out".

He identified Mrs. George Richardson as the one who made this statement. Said all the officers in the room asked questions. He said he finally saw his mother sign a paper, but didn't know at what hour it was.

On cross examination, he testified that both he and his mother signed a paper but not at the same time.

Q. They asked you some questions first, and then they took them down on the typewriter—do you know what a typewriter is?

A. Yes.

The witness said the statement was typewritten; they read it to him and gave it to him to read and he asked the meaning of a couple of words in the statement which were explained to him.

(Testimony of Robert Chang.)

Q. Then, after they got through explaining, and you got through reading it, you signed the paper, didn't you?

A. They told me to sign the paper.

Q. Who told you?

The witness identified Mr. George Richardson as the man who told him. He was asked if after he signed the statement the man on the typewriter didn't start writing again, his mother being asked questions, but the witness answered that the mother had "signed first".

Q. She signed first?

A. Yes; then afterwards they take that paper away and make it over again, and my mother sign then.

He was asked if his mother did not talk in Hawaiian to "this big Hawaiian policeman, Mr. Richardson" and he said he didn't remember. Said his mother speaks Hawaiian. [80]

Q. They didn't threaten to hurt you in any way, did they?

A. They want to lick me.

Q. Who wanted to lick you?

A. That first fellow that come in here, he want to lick me.

Q. Did he hit you?

A. No.

(Testimony of Robert Chang.)

He said four or five of the officers questioned him on the night of December 19th.

Q. When you signed this paper did he threaten to hit you or anything, when you signed it?

A. They tell me tell the truth and they tell me if I no sign the paper I no get free, if I sign the paper I get free, it would be better for me.

The cross examination being concluded the Court asked the witness if he knew "what that paper speak". The witness answered "After this policeman take it off, they poke right in front of me, I don't know what with; they open the case."

The COURT: Did they read the paper to you before you signed it?

Mr. BOTTS: He's talking about the paper you signed that night, Robert, not about the opium.

The COURT: They read the paper? You said they explained some words to you?

A. Yes.

The COURT: After they explained some words, you understood everything that was in that paper?

A. What you mean?

Mr. BOTTS: You understand the Judge's question? He wants to know if you savvy what the words said in that paper.

A. All the words?

Q. What they meant.

A. I think I know what it said; they tell me in the courthouse.

The COURT: Did you read it yourself?

A. Yes, I read it.

The evidence in support of the motion having been completed, the movant rested and the following proceedings were had:

G. J. RICHARDSON

was called on behalf of the plaintiff in opposition to said motion, and sworn testified as follows:

That he is Inspector of Police, County of Hawaii, and has held such job between fifteen and sixteen years and was with the [81] Hilo Police Department in December, 1935. That he knows the defendants. That he had these defendants booked at the Police Station December 18th. That they were booked for investigation to the Hilo Police Department where they remained booked until the evening of December 19th between 9 and 10 o'clock. That the witness was present on the evening of December 19th when the defendants were questioned; that they were not threatened in any way. That the questioning was conducted in his office with the windows open. His office is on the lower floor of the Police Building, the door opening on to the corridor. That Robert was questioned first and later the mother. That in the evening the two defendants were together sitting at the table

(Testimony of G. J. Richardson.)

and Narcotic Officer Wells did the questioning and the stenographer took it down. Asked if there was anything said to the effect that the woman would not be permitted to go to sleep until she signed the paper, he answered in the negative. He said she had her infant child in her arms. Asked if the child fussed or cried, he said "a very nice child in the office all the time". That he did not hear it cry at all. That the woman did not ask him at any time to use the telephone. Asked if he had any conversation with his woman in Hawaiian, he first said "no" and said later on he and Captain Martin did have such a conversation but the nature of the conversation was "just joking and talking". That this occurred after statements were taken. He said the boy's statement was taken first and it was taken after supper which he said was some time after 7 o'clock. He said John De Mello, sergeant of the recording office, took the statement down and after it was taken down it was handed to Robert to read and he read it. That he mentioned one or two words that he didn't understand to Mr. Wells and the meaning was [82] explained to him by Mr. Wells and having finished reading it, he signed it. Asked if any promises were made, he answered none were made by him. It couldn't have been made by him and if made by others, he didn't hear any. He said he didn't hear anybody tell the boy that unless he signed the statement he

(Testimony of G. J. Richardson.)
would stay in jail twenty-five years. Asked if the woman "during the time the statement was taken" asked permission to go to sleep and he said she did not. Said the boy and the woman were down at the Police Station in the afternoon. Asked if anything was said to the woman about going back to the jail for dinner and he said there was and said she didn't want to go. He said they wanted to take both defendants to jail for dinner; that she said she would buy her own if she could. That Captain Martin, in charge of the watch, sent somebody out, but he didn't know what they got for her. That the boy had dinner at jail. That both defendants were questioned in the afternoon. The questioning began between 3 and 4 December 19th. That Mr. Wells came in on a plane and the plane was late. That the witness left for home for dinner about half past 5 or 6; he lives 6.4 miles out of town, and after dinner he came back to the Police Station. Said the woman, during the questioning, did not act distressed or nervous or anything of the kind, nor did she complain about being exhausted or tired. Said the woman was not mistreated and made no statement about worrying about her baby. That the questioning by Mr. Wells was in a "very ordinary tone of voice". That there was no brow-beating. He said that in the evening the woman had told the son to tell the truth and said this to him a number of times. That he heard it two or three times himself. Asked if after hav-

(Testimony of G. J. Richardson.)

ing taken Robert Chang's statement in the evening if the woman was questioned as to the truth of the matters contained [83] in the statement and he said he didn't remember. He said he was fairly sure Robert's statement was taken first and immediately thereafter Mr. Wells proceeded to take her statement. That as soon as these statements were taken they were booked to the Federal authorities. That they were taken before the Commissioner "next day some time"; he didn't know the time of day. Said that when the statements were completed it was late in the evening and he released them from investigation and he charged them as Federal prisoners.

On cross examination he said his first contact with Mrs. Ah Fook Chang was on Wednesday evening when officer Pacheco picked her up, he being across the street at the time. That she was picked up on suspicion that she had something to do with the opium transaction. That they took her to the Police Station and booked her and from there she was taken to the jail with her baby. No questions were asked her that night. That she remained in jail from early Wednesday evening until the following afternoon when Mr. Wells arrived. He said Mrs. Ah Fook Chang was not taken to the Maunakea Rooming House and shown this opium. That Norman Godbold is United States Commissioner. That his office is right above the witness' office in the Police Department. That the distance from the Com-

(Testimony of G. J. Richardson.)

missioner's office to the point where the woman was arrested was "about four long blocks", and the jail was about a quarter of a mile from where the woman was lodged. That United States Commissioner Godbold was in Hilo during the days of December 18th, 19th and 20th. That the first questioning of the woman defendant occurred December 19th between 3 and 4 and was conducted by Narcotic Agent Wells. That Lee A. Pearson, federal officer, had participated in the arrest of Robert Chang. That Pearson, together with some Hilo police had stopped Chang, arrested him, entered his room and there [84] seized the opium. That when Mr. Wells arrived, the witness turned his office over to him. That Mr. Pearson was present during the afternoon. That the major part of the questioning was done by Mr. Wells though some questions were asked by Mr. Pearson and some by the witness. That the reason that the major part of the questioning was done by Mr. Wells was because it was a federal case and the witness had regarded it as a federal case from the beginning because it involved a quantity of opium. That the questioning continued in the afternoon up to dinner time. That the dinner recess was taken about 5:30. That the woman had denied any criminal connection with the opium transaction until that night. That that night the questioning was resumed after 7. That in the evening there was present Mr. Wells, Captain Martin, Sergeant DeMello and the witness himself. Asked what time he finally left his office to go home that night, he said "Oh, I should say some time

(Testimony of G. J. Richardson.)

after 10". Asked if it wasn't nearer 12, he said it might have been; that he paid no attention to that. Asked if when she signed the statement, that ended the investigation, he answered: "That ended it" and he was free to go home. He said she had the infant baby in her arms all the time.

Q. You noticed we were unable to keep the baby in the courtroom today because it was crying. Didn't you notice it crying during those hours?

A. No sir.

Q. You mean that infant stayed there in your office from afternoon until around midnight and never cried?

A. I didn't hear it once.

Q. Well, could it cry and you couldn't hear it?

A. I could have heard it.

Q. Could it have cried and you not have heard it?

A. Well, I didn't hear the child cry at all; it wasn't fussing at all.

(The child suffering from a cold was fretful and by consent of counsel the mother took the child from the courtroom.) [85]

Asked if he didn't recall that she wanted to get word to her family so they wouldn't worry, the witness said, "she didn't mention a word to me." [86]

The court asked the witness if on December

(Testimony of G. J. Richardson.)
19th he noticed the woman nursing her baby and asked how many times he said: "Oh, a number of times. In the afternoon, she would take out her breast and nurse the child."

WILLIAM J. MARTIN,

the next witness called by the plaintiff in opposition to the motion, being duly sworn testified as follows:

That he is Captain of Police of the Hilo Police Department and was such in December last. That he knows the defendants. That he recalled the night in December when the two defendants signed statements in the Hilo Police Station. That about supper time, Robert Chang was taken back to jail for his dinner. That the woman didn't want to go back to jail and eat and so she stayed at the Station. Asked me if she could buy her own food, which he told her she could. One of the police officers went out for food for her. That he brought back a bag of cookies for the baby "and brought this Chinese cake they call mangu". He was asked what mangu consists of and he said "Well, it's mashed beans and * * *." He said the officer bought her Chinese cake called pepeau, which is made out of pork. That they made no restrictions with reference to the food; that she could order it. That she ate this food. He was asked if he was present when the statements were taken from the defendants in the evening and he said he was and he said that

(Testimony of William J. Martin.)

the defendants were in the room together when the statements were taken and besides the defendants in the room there were Mr. Richardson, Mr. Wells, Mr. Pearson and himself. That Mr. Wells and Mr. Pearson did the principal questioning. That he did not hear anyone, during the questioning, tell the woman that they wouldn't quit questioning her until she signed a paper. That the woman when she came to the Police Station that afternoon nursed the baby and that she [87] also nursed the baby in the Police Station. Asked if the baby cried or made any disturbance, said not that he knew of. That he was there approximately all the time. Asked if he heard anyone say that unless she signed the paper the boy would go to jail for twenty-five years, he said he did not. Asked if he talked to the woman in Hawaiian, he said she understood Hawaiian and he talked to her in that language but the conversation in Hawaiian was just ordinary talk, not serious talk, but talk "in a joking nature". That in questioning, nobody yelled out at her or anything like that. Said the investigation was over on December 19th about 10 o'clock.

The witness' attention was called to the fact that Mrs. Ah Fook Chang said she signed the purported confession about 11:30, the witness stated that he was positive it was not that late. He said that so far as he knew no effort was made to take the woman before United States Commissioner Godbold on December 19th. That he booked Mrs. Ah Fook Chang

(Testimony of William J. Martin.)
at the Hilo Police Station at 7:26 P. M. December 18th. That she was booked on suspicion that she had something to do with the opium found in Robert Chang's room.

ANTONE PACHECO,

the next witness called by the plaintiff in opposition to the motion, being duly sworn, testified as follows:

That he is a member of the Hilo Police Department and was a member on December 18th. That he was the officer who went into a store "and picked up Mrs. Ah Fook Chang on that date". That at the time she was talking to Mrs. Chun Doon. That at the time he went into the store, she was not drinking soda water or anything like that. That when he went in he asked Mrs. Ah Fook Chang if Robert Chang was her son and that she answered in the affirmative and inquired what was the matter. That he asked [88] her if she would go along with him and said "all right" and she picked up her baby and George Richardson was across the street and joined them and the three went up to Room 10 in the Maunakea Rooming House. That he did not yank her arm or drag her across the street or threaten her in any way. That when they went into the room the two shoe boxes of opium were open, exposing the opium. That from the room she and her son, Robert Chang, were taken to the Police Station and booked. That in the early part of December 19th, he was present in Mr.

(Testimony of Antone Pacheco.)

Richardson's office for a short time while defendants were being questioned, but was not there when they signed the first statement. Was there when there was some questioning in the afternoon. Asked if in the early evening of December 19th, he heard this woman say they wouldn't stop questioning until she signed the paper he answered in the negative and said the baby was not crying. Asked if at any time if he heard them say they wouldn't stop questioning until she signed the paper he said he didn't.

On cross examination,

the witness' attention was called to the testimony of Mr. Richardson that the woman was not taken to Robert Chang's room but was taken to the Police Station and booked the witness said he was sure they had taken her to the room. That he took her in custody about 7:15 or 7:20. That she was booked at the Police Station for investigation. That they suspected she had something to do with the opium found in her son's room and it was on that suspicion that she was taken into custody.

Q. You had no proof of that; it was just a suspicion, was it not?

A. Through the connections that mother and son were in the afternoon.

Q. You suspected that she probably had something to do with it?

A. Yes sir.

Q. And on that basis you arrested her?

A. Yes sir. [89]

(Testimony of Antone Pacheco.)

Asked if he had questioned the woman at all on December 19th he said he was talking to her a few minutes in Richardson's office. He was then asked if Mr. Wells conducted most of the investigation and said:

> A. Well, I went out and I called Mr. Wells, when she told me that the reason why her boy and her was in trouble was because of a fellow in Honolulu wrote to her on Maui and told her to send her son down to get this opium.

The witness said that when she told him this, he went out and called Mr. Wells and told him what she said "and he took care of it."

On redirect

the witness was asked, regarding this conversation he had with the woman:

> Q. What did she tell you?
>
> A. She told me that a fellow from Honolulu had wrote to her for her to send her son down to get this opium, and then the son would meet her on Maui, going to Hilo; so then I came out and got hold of Mr. Wells, and Mr. Wells took care of it.

When this conversation happened the witness was alone with Mrs. Ah Fook Chang. That before she made the statement she denied ever having anything to do with the opium. That he recounted to Mr. Wells what the woman had told him. That

(Testimony of Antone Pacheco.)

when the woman made the statement to the witness, he didn't tell her "anything about if she didn't tell the truth or didn't talk that she would be in jail for a year or anything like that". Said this conversation occurred between himself and the woman shortly after 5 o'clock. That Mr. Wells was outside. That he couldn't tell exactly the time the conversation happened but he said it must have been before dinner. That he wasn't there when they questioned the woman after dinner but only in the afternoon. That the baby was in her arms all the time. "The baby looked nice; wasn't crying at all, didn't look sick". That she nursed the baby. [90]

GEORGE J. RICHARDSON

was recalled for further evidence by the plaintiff. He was asked if at any time during the investigation he doubled up his fist and made a motion toward Robert Chang as if he was going to hit him and he said he did not.

WILLIAM K. WELLS,

the next witness called by the plaintiff in opposition to the motion, being duly sworn, testified as follows:

That he is a Federal Narcotic Agent and was in Hilo on December 19th last, arriving about 2 o'clock and questioned the defendants after his

(Testimony of William K. Wells.)

arrival, the questioning beginning about 3 o'clock or a little after. That the questioning occurred in Inspector Richardson's office. That during the questioning nobody in his presence said they would not allow Mrs. Ah Fook Chang to rest with her baby until she signed a paper nor did anybody double up his fist and threaten to hit Robert Chang. That the witness did most of the questioning. That there was no bull-dozing during the questioning. That that evening just before dinner, Officer Pacheco spoke to him with reference to a conversation he had just had with Mrs. Ah Fook Chang. That what Pacheco told the witness was that Mrs. Chang told him did not accord with the statement she had given the witness in the afternoon. That the questions asked in connection with the making of these statements were mostly asked by himself and Mr. Richardson. That there was no bull-dozing in obtaining these statements. That after the statement of Robert Chang was typewritten, he read this statement. That there were a few words that Robert Chang did not understand and asked the meaning of and the meaning was explained and the witness asked Robert Chang if it was true and he said "yes" and the witness asked him if he would sign and he said "Sure" and he signed the statement. He was asked if he had told Robert Chang that if he did not sign it he would stay in jail for twenty-five years and he said he did not, nor did he tell him that if he sign it he would go free and that he made no such statements to [91] Mrs.

(Testimony of William K. Wells.)

Ah Fook Chang. He said that Mrs. Ah Fook Chang told him that she wanted him to help her boy, not to put him in jail and the witness told her that he didn't have anything to do with it. He couldn't promise her anything. That he made no promises to either defendant or did anybody else make a promise to either of them in his presence. That while these statements were being taken the baby was in her lap, was never fretful nor crying. That while he questioned her in connection with the last statement he thought she nursed the baby twice. That he thought the last statement was obtained between half past ten and eleven o'clock at night. That after it was done he went home and charged the defendants the next morning before United States Commissioner Godbold with a violation of the Narcotic Laws. That next morning as soon as he got the charges ready he took the defendants before the Commissioner. That after he took Mrs. Ah Fook Chang's statement he read it to her and asked her if it was true and she said "yes".

> A. * * * I asked her to sign it; she said "Yes" and she signed the statement.

He denied that he or anybody in his presence told her that if she didn't sign it she would stay in jail until she did, nor did anything like that take place.

(Testimony of William K. Wells.)

On cross examination

the following proceedings were had (Exception No. 4):

Q. Mr. Wells, have you that statement that she signed?

Mr. MOORE: I have the statement in my file.

Mr. BOTTS: I ask counsel to produce it, Your Honor.

Mr. MOORE: I feel, Your Honor, that I'm not called upon to produce it.

The COURT: The Court is not concerned with what's in the statement, but how it was obtained.

Mr. BOTTS: We submit that upon proceedings pertaining to a confession we're entitled to have the instrument itself produced in court for inspection, not only for the court but for the defendant himself and his counsel.

The COURT: That would be true when the statement is offered, but not prior to that. This is not a fishing expedition. [92]

Mr. BOTTS: It's not a case of a fishing expedition.

The COURT: Well, it looks very much like it when you ask to see the statement.

Mr. BOTTS: There's a specific statement alleged to have been taken from this witness, and we submit at this time on proceedings in advance of trial we're entitled to the production of that statement in court.

(Testimony of William K. Wells.)

The COURT: The Court's view of that differs from that diametrically.

Mr. BOTTS: Your Honor refuses to compel the production?

The COURT: Yes, that's the effect of the ruling.

Mr. BOTTS: Exception.

The COURT: Let the exception be noted.

The witness said he came to Hilo for the purpose of this case and was sent there under instructions of District Supervisor Stevenson on information received from Mr. Richardson of Hilo. That Mr. Pearson is a federal officer there of the Treasury Office in Hilo and often assists the witness in narcotic cases arising on the island and had taken part in this case and had met the witness at the airport that morning with Mr. Richardson. That he arrived at the Police Building in the afternoon and started questioning the defendants and took charge of the proceedings which was what he came over for. That he knows Mr. Norman Godbold and no effort was made to get him on December 19th. That he didn't go before him until the following day. He explained to the defendants that he was a federal narcotic agent investigating the case. The witness said: "Then I asked her who sent her boy Robert up to Hilo. She stated that Dang Wing Kong came to her house and asked her if her son wanted to go to Hilo." That she denied complicity in the jail when he first talked to her. That he told "her that night that what she said could be

(Testimony of William K. Wells.)

used against her, that if she didn't want to make any statement it was up to her." He was asked if that morning he prepared a written statement. He was asked if that appeared in the statement and he said: "I think, in the first or the second statement we put that down, and in the last statement I don't think I've got it on there." [93]

Q. Well, how many statements did you take from her?

A. About three.

Q. About three?

A. Yes.

Q. Well, were they all signed statements, you mean?

A. Well, no sir. Before they got to the end I thought they weren't telling the truth, and I caught them in little lies, and started questioning them again.

Q. Let me get this clear, Mr. Wells. There were three statements, I understand?

A. Yes sir.

Q. The first statement, when would you say that was taken?

A. A little after 3 o'clock.

Q. And that was never signed by her?

A. No sir, I don't think so.

Q. In that statement she denied that she had any complicity in this transaction?

A. Yes sir.

(Testimony of William K. Wells.)

He then testified that he took a second statement from her in which she also said she didn't have anything to do with the opium transaction. He was asked if he had that statement and said he did not that he destroyed it as he had also destroyed the first statement.

Q. So you took three statements, two of which were destroyed, and the third remains intact?

A. Yes sir.

Q. And it's in the third statement she admits participation in this opium transaction?

A. She admits it.

Q. When that was written up and signed, that completed your investigation, and she was charged with a narcotic offense?

A. Yes sir.

Q. But she wasn't brought before the Commissioner until next morning?

A. Until next morning.

The plaintiff having rested, the movant recalled

MRS. AH FOOK CHANG

to the stand and the following proceedings were had:

The witness was asked if anybody had told her when they were questioning her that she didn't have to make a statement if she didn't want to and didn't have to talk if she didn't want to and she said nobody said that, nor did anybody tell her that if she did talk it would be used against her in court. She was asked if anybody said "if you go ahead and

(Testimony of Mrs. Ah Fook Chang.)
talk that what you say can be used against you in court" and she said "I don't know." [94]

(Exception No. 5):

The evidence having been adduced the matter was submitted to the court for decision and the court did deny and overrule the said motion, to the denial and overruling of which defendants duly excepted and said exception was allowed.

The foregoing contains in narrative form all of the evidence adduced on the hearing of the motion to suppress evidence.

Thereafter the jury was empaneled and sworn and the trial of this case commenced on Tuesday, the 18th day of February, 1936, Willson C. Moore, Esquire, appearing for the plaintiff and E. J. Botts, Esquire, appearing for defendants; whereupon, to sustain the issue on its part, plaintiff called M. B. Bairos, Chemist of the Territorial Board of Health, and in lieu of his testimony, counsel for defendants stipulated that he would testify that he had examined two tins of the twenty-four tins of opium involved in this proceeding, and that such tins so examined contained smoking opium and opium prepared for smoking.

The plaintiff then called

R. TAKEMOTO,

police officer of the South Hilo Police Department, who has been so employed for thirteen years and was so employed on December 18th, 1935. He identified the defendant, Robert Chang, and said that on

(Testimony of R. Takemoto.)

December 18th he saw him in front of the Maunakea Rooming House on Kilauea Avenue in Hilo about 5 o'clock in the afternoon. He said his first conversation with him was about 7 o'clock in the evening. Asked what he was doing just prior to the conversation, the witness answered:

A. First I saw him he was coming out of Maunakea Rooming House; he came outside to the walk, he was also trying to cross Kilauea Avenue in front of Maunakea Rooming House. I went there and called him back, I told him. I told him we were police officers, "We want to look into your room, can you give us permission to go into your room?"

Q. And what did he reply?

A. He said "O.K." [95]

The witness said that Robert Chang led them to his room, which was Room No. 10 in the Maunakea Rooming House on the second floor.

Q. When you got to Room No. 10, what did you do?

At this point the following proceedings were had: (Exception No. 6):

Mr. BOTTS: At this point, if Your Honor pleases, for the record, we want to interpose an objection to anything that happened after they got to the room, on the ground that what transpired thereafter was an illegal search and seizure, so, if Your Honor pleases, that I won't have to interrupt this witness and the trial may proceed;

(Testimony of R. Takemoto.)

Mr. MOORE: I have no objection——

Mr. BOTTS: (continuing): that all evidence relating to any search there may be considered as coming in over my objection, and my exception duly noted.

Mr. MOORE: I have no objection.

The COURT: Yes; the objection will be overruled, and it may be noted that the same objection will obtain and the same ruling as to all evidence pertaining to what was found in room 10.

Mr. BOTTS: And the exception will be considered as applying?

The COURT: The exception will likewise apply.

The witness said that when he got to the door, Robert Chang took a key from his pocket, opened the door, went into the room, turned on the light and told us "Come in". They entered the room and when they got in the room they saw a suitcase lying on the floor and Robert Chang was asked what was in the suitcase and he "opened the suitcase" and told them to "Go ahead and see what was in it". The witness said that Mr. Lee A. Pearson, Federal Officer connected with the Alcohol Tax Unit, went to the suitcase and took out a box which he found contained twelve tins of opium. The witness identified the box. The witness then testified that another box of like size and appearance was found on a table in the room and that this box contained twelve tins

(Testimony of R. Takemoto.)

of opium, which he identified, his identification being both of the box and the opium and he [96] also identified the suitcase which contained one box of twelve tins of opium.

He said that at the time he went upstairs with Robert Chang, Mr. Pearson and Antone B. Pacheco, a police officer of South Hilo, were with him.

The witness was asked what happened after they found the twenty-four tins of opium and he said that George Richardson, Inspector of Police, had Robert Chang and Mrs. Ah Fook Chang, his mother, taken to the Police Station. He said he first saw Mrs. Ah Fook Chang "when she came up to the room", and after that she was taken to the Police Station.

On cross-examination,

he said that he first saw Robert Chang about 5 o'clock in the afternoon of December 18th on Kamehameha Avenue when the witness was with officers Pearson and Pacheco. Though he saw him at 5 o'clock, he didn't talk to him until 7 o'clock. He said that they followed him from 5 o'clock until 7 o'clock and this was done under direction of George Richardson, Inspector of Police of South Hilo. He said they followed him to his rooming house and took a position to wait until he came out.

Q. You knew he had opium in his room?

A. No, I didn't know that he had opium in his room.

Q. But you wanted to search his room didn't you?

A. Yes sir.

(Testimony of R. Takemoto.)

Q. And you wanted to search his room to see if he had opium?

A. Yes, I wanted to search it to see.

Q. The information you received from Mr. Richardson was to the effect that he had opium in his room.

A. Yes sir.

Q. And it was acting on that information that prompted you to ask him to let you go up and look at his room?

A. Yes sir.

The witness said that when he spoke to Robert Chang, Pearson was right behind him, but Pearson didn't say anything until they got into the room. When the opium was found, Mr. Pearson became its custodian. [97]

MR. LEE A. PEARSON,

Investigator, Alcohol Tax Unit, U. S. Treasury Department, was sworn and examined and testified that he was so employed on December 18, 1935. He identified Robert Chang. Said he first saw Robert Chang December 18th "coming out of Charlie Chang's Chop Sui". That a few minutes after 7 o'clock he was present when Robert Chang came out of the Maunakea Rooming House. Said that Takemoto showed him his police badge and asked him for permission to search his room and the boy replied "O. K. come on up". The witness said the boy led the way to his room on the second floor, opened the door with a key taken from his pocket,

(Testimony of Lee A. Pearson.)

went in, turned on a light and said "Come on in". The witness said he saw a suitcase lying on the floor which he identified as the one offered for identification in the case. The witness said he asked Robert Chang what was in the suitcase, and the latter said "Open it up". The witness said he asked Chang if he would open it up and defendant reached down and lifted the cover of the suitcase, disclosing a box wrapped in Christmas paper. The witness opened the box and found it contained twelve tins of opium. That thereafter officer Takemoto handed him a similar box taken from a nearby table and this also contained twelve tins of opium. He identified the boxes which held the opium and also the cans of opium. The opium remained in the witness' custody until he turned them over to Narcotic Agent, William K. Wells, on Sunday, December 22nd. He was shown a small memorandum book, which he said he turned over to Mr. Wells. He said a few minutes after they entered Robert Chang's room, Police Officer Pacheco came in with Mrs. Ah Fook Chang and Police Inspector Richardson. After her arrival "we took both of them to the Police Station", where they were booked for investigation to Police Inspector Richardson "as a member of the Hilo Police Department". He said he saw these defendants next [98] day in the afternoon when "we questioned them in Police Inspector Richardson's office". He said Robert Chang was first questioned. The questioning was by Police Inspector Richardson, Narcotic Agent William K. Wells and the witness. That

(Testimony of Lee A. Pearson.)

Wells did most of the questioning. That he arrived in Hilo by airplane December 19th at 2 P. M. He was met at the airport by the witness and the questioning of the defendants began shortly before 4 P. M. on December 19th. That the questioning was conducted in an ordinary tone of voice, the windows were open, the door was alternately closed and opened. The witness said that "I told the defendants they didn't have to make any statement if they didn't want to"; that he, the witness wanted to warn them of their constitutional rights and that if they made statements they would have to be made voluntarily and of their own free will and that no promise could be made to them of anything. The witness denied that any promises were made to the defendants during the time he was there in the afternoon, either by him or anybody else. Asked if anything was said to the woman defendant to the effect that they would not cease questioning her until she signed a statement, he answered that nothing of the sort had been said to her while he was there in the afternoon. He was not present in the evening when she was questioned. The witness said that Robert Chang was questioned first; asked where the mother was in the afternoon while Robert Chang was being questioned, he answered: "at first she was there. I believe during all of the questioning she was in the Receiving Room at the Police Station."

Q. That's where you call the booking desk is located?

(Testimony of Lee A. Pearson.)

A. At the booking desk.

Q. Then when you started questioning (her) where was Robert?

A. Robert was removed to the booking desk room.

The witness said that he left shortly after 5 o'clock in the afternoon and both defendants were still at the Police Station. [99] That he did not return until late that night when the questioning had finished.

On cross-examination,

the witness said that he began the investigation of this case about 1 o'clock in the afternoon but did not see Robert Chang until 5.

Q. You were investigating the case, I take it?

A. We were investigating Mrs. Ah Fook Chang.

He said he didn't apply to the Commissioner for a search warrant. That he didn't have any facts to obtain the search warrant on; that Norman Godbold is United States Commissioner at Hilo and his office is right above Mr. Richardson's office in the Police Station there. In the evening at approximately 7 o'clock on December 18th, both defendants were taken to the Police Station and booked for investigation and lodged in jail. That the witness didn't make any effort to take them before a United States Commissioner, not even for the purpose of charging them, nor did anybody else, nor was any-

(Testimony of Lee A. Pearson.)

thing done in this regard the next morning. He said he knew defendants were ultimately taken before Norman Godbold and charged, which was on Friday, December 20th. He was asked when he first cautioned the witnesses about their constitutional rights with reference to making statements. He said it was about 4 P. M. Thursday afternoon. Asked again the language Takemoto used in asking Robert Chang for permission to search his room, he answered: "To the best of my recollection, he said 'Can we have permission to search your room?' "

Q. Did he say anything about his constitutional rights then?

A. He did not.

Q. Anything about the Fourth and Fifth Amendment provision on that occasion?

A. No sir.

On redirect examination

the witness testified that in the afternoon when the woman was questioned, she had the baby with her all the time. The witness said the baby seemed very healthy, didn't cry or fuss at all. [100]

The next witness called was

GEORGE A. RICHARDSON,

Inspector of Police, County of Hawaii, who has has been with the Police Department between fifteen and sixteen years and was connected with it in December, 1935. He identified the defendant. He said he first saw the defendants around 7 o'clock P. M., December 18th. That he first saw Mrs. Ah Fook Chang, who was sitting in a Chinese

(Testimony of George A. Richardson.)
store on Kilauea Avenue. She came out of the store accompanied by Police Officer Pacheco. Said they took her upstairs in the lodging house and then took her and Robert Chang to the Police Station to be booked for investigation to the County Police and that they remained county prisoners that night. The next day, Narcotic Officer W. K. Wells arrived from Honolulu by plane and that evening he booked them as federal prisoners. He said that after Narcotic Agent Wells arrived, the defendants were questioned at the Police Station and in the witness' office, the questioning starting between 3 and 4 o'clock in the afternoon on December 19th and present during the questioning were the witness, Mr. Wells, Mr. Pearson, Mr. Pacheco, Officer Takemoto and a stenographer named DeMello. He said Mr. Wells conducted most of the questioning, but the various ones present asked questions, including himself. In the afternon the boy was questioned first and later on the mother. During all the time she was questioned the baby was in her arms. Asked if it cried or fussed, he said it did not and that it was a very well behaved child. He said that after they went to dinner and returned about 7 P. M., they resumed questioning the defendants. Asked if at any time during this questioning he told the woman he wouldn't quit until she signed a paper, he said no and that he didn't hear anybody else make such a statement. The doors and windows were open while the questioning was going on and the interrogation was conducted in the average tone of voice, without

(Testimony of George A. Richardson.)
any "bull-dozing" or "bull ragging". He said that after the questioning was interrupted for dinner, the woman did not go back to [101] jail but asked if she could rest in the Police Station though the boy went up to jail for his dinner.

He then testified that on December 18th, he received information in the morning of that day that defendants had opium, but his information was not positive as to where it was and it was under his direction that officers of his department kept defendants under surveillance. He said that in the afternoon of December 19th, Mr. Wells took two statements from the defendants and he was present while these were being taken. That he first took Robert Chang's. That after it was taken, it was given to him to read; that he read it and a few words he didn't understand, he asked Mr. Wells to explain to him, which Mr. Wells did, following which he signed it. That there was no force of any kind used. He said the defendant read the statement, was then asked by Mr. Wells if he was willing to sign and he signed it. He identified the paper signed by defendant, which was later introduced in evidence as plaintiff's exhibit "A". He then said that after Robert Chang's statement was taken a statement was taken from Mrs. Ah Fook Chang and after it was taken it was given her to read and she read it and after reading it she was asked if she was willing to sign it and she signed it. That no force or anything of the kind was used. The witness also identified this statement, which was later

(Testimony of George A. Richardson.)
introduced in evidence as plaintiff's exhibit "B".

The witness on cross examination said that Mr. Wells took three statements from Mrs. Ah Fook Chang, the first two he destroyed and the last one being U. S. Exhibit "B". The first statement was taken from Mrs. Ah Fook Chang in the afternoon after Mr. Wells' arrival and in this statement, she denied any connection with the opium. The witness was asked if later in the day Mr. Wells didn't take a second statement from Mrs. Ah Fook Chang in which she also denied any [102] connection with the opium and he said he didn't know about the second statement. He said the opium was turned over to Mr. Pearson because they had no facilities to keep it at the time because the clerks who had charge of the safe were off duty and that Mr. Pearson took it up to the Federal Building to put in the safe there. That he regarded this as a federal case from the beginning.

Q. In other words, opium seized in these quantities have been subject for federal prosecution?

A. It's been the custom.

Q. And that's how it was treated in this case?

A. Yes sir.

Q. Consequently, Mr. Pearson became custodian of this opium, and then when Mr. Wells arrived you let him take charge of the proceedings?

A. Yes sir.

(Testimony of George A. Richardson.)

Q. Because you regarded this as a federal case?

A. Yes sir.

Q. And Mr. Wells is a narcotic officer?

A. Yes sir.

Q. And that was his special duty?

A. Yes sir.

Q. This woman was put in jail, we understand, about 7 o'clock Wednesday afternoon?

A. Yes sir.

Q. She was charged with no offense, nor was any bail fixed for her, but she was kept in jail overnight?

A. Yes sir.

Q. And that same thing continued all next day?

A. Correct.

Q. And when Mr. Wells arrived, he didn't take her before Mr. Norman Godbold and charge her?

A. No sir.

Q. And he arrived about 2 o'clock or 3 o'clock you say?

A. About 2.

Q. And they questioned her and questioned her until late that night?

A. Well, with a rest period of about an hour for dinner.

Q. And the questioning ceased when she finally signed the statement?

A. Yes sir.

(Testimony of George A. Richardson.)

Q. But she still wasn't taken before the Commissioner until next day?

A. Next day.

Q. She was lodged in jail with an infant baby that she is carrying now?

A. Yes, sir.

Q. And the baby continued there with her until Friday, when she made bail and was released?

A. Until Friday, yes sir. [103]

On redirect,

he said that they first questioned the boy during which time the woman wasn't being questioned; then the woman was questioned, then after dinner they started to question the boy first and while they were questioning the boy the woman was not being questioned and that when they finished with the boy they began questioning the woman again. He said that during this questioning no request was made for the use of the telephone or anything like that. That the only request she made was for something to eat and that the witness asked Captain Martin to get it for her. In reply to the court's question, the witness said that United States Commissioner Godbold's office is on the second floor of the same building that his office is in. That his office is on the ground floor with the windows looking out into the courtyard. That the door opens on the

(Testimony of George A. Richardson.)
corridor that goes up to Judge Godbold's office. He said that it has been the practice when narcotics or liquor are very small to handle them in the territorial courts, but when large to turn it over to the Federal authorities and in this case he rang up Mr. Stevenson, head of the local division of the Federal Narcotic Office, notifying him of the case and Mr. Wells came over the next day. That the population of Hilo is between seventeen and eighteen thousand. He said that the police sometime make investigations and turn the case over to the Federal Government and visa versa and that in this particular case the investigation was being made by him as a Hilo police officer assisted by Mr. Pearson, a federal officer.

The next witness was

WILLIAM J. MARTIN,

Captain of Police in Hilo who held that office on December 18th. That on that night he booked Robert Chang and Mrs. Ah Fook Chang for investigation at the request of Mr. Richardson. That the booking was made at 7:26 P. M. That the witness was on duty the next evening. That around dinner time next evening Mrs. Ah Fook Chang made a request for food and that he detailed an officer to buy the food she wanted, which consisted of cookies for the baby and some Chinese food, "manju they [104] call it; it's chopped rice, beans, and pork * * * and pepeau * * * made of pork and rice", which she ate. That he came on watch at 4 o'clock

(Testimony of William J. Martin.)

in the afternoon of Thursday, December 19th. That the baby was with the mother and wasn't fussy. That the mother nursed the baby a couple of times while he was there. That he was present in the evening when a statement was taken from the defendants. That he did not, nor did anybody in his presence, tell the woman that she wouldn't be permitted to go out "unless she signed the paper" nor did he hear anybody say that unless she signed the paper her boy would be put in jail for twenty-five years. That there was no bull-dozing or bull-ragging; that is, hollering at either of the defendants. That the questions were asked in an ordinary tone of voice. That he was present when Robert Chang made a statement. After it was typed they gave it to Robert Chang to read and he read it.

Q. Did he ask any questions about any of the wording or anything in it?

A. He did not.

He said he signed it after he read it and identified the statement, which later came in evidence as plaintiff's exhibit "A". He saw the boy sign it. That when he signed it, he wasn't threatened in any way. That the defendants were booked to Mr. Wells on December 20th. His attention was called to Mr. Richardson's testimony that they were booked to Mr. Wells late the 19th, but the witness said that it was "the morning of the 20th".

(Testimony of William J. Martin.)

On cross examination,

the witness said there is no federal jail in Hilo and that federal prisoners are held in the Hilo jail as an accommodation.

Q. So, in this case, or other cases where Mr. Pearson or a federal officer brings in a prisoner, he is confined in that jail?

A. Yes sir.

That Robert Chang signed his statement about 10:30 on December 19th and that Mrs. Ah Fook Chang signed a statement later than that and after she signed the statement "that ended the business". That [105] she had the baby with her all the time holding the baby in her arms. That the baby had been with her in jail Wednesday evening.

ANTONE B. PACHECO

was the next witness called by the plaintiff. He is a police officer and identified the defendant, Robert Chang, and said that on December 18th about 7 o'clock Police Officer Takemoto spoke to defendant. Said that defendant was crossing the street from the rooming house and that Police Officer Takemoto in company with Pearson and the witness stopped him and "told him that if he would give us permission to go up and search his room".

Q. What did he say?

A. Yes sir—O. K.

(Testimony of Antone B. Pacheco.)

He then gave substantially the same account of entering the room and finding the opium as was given by the witnesses Takemoto and Pearson. He said that after finding this opium he went downstairs "and picked up Mrs. Ah Fook Chang", finding her "inside of Chung Doon's store where she was talking to Mrs. Chung Doon". He said he asked Mrs. Ah Fook Chang if Robert Chang was her son and she answered "yes sir", and he said he told her he wanted her to come upstairs because he wanted to see her. He denied that he got hold of her arm and yanked her or anything like that saying she simply accompanied him to room 10 of the Maunakea Rooming House where they stayed for a few minutes and then went to the Hilo Police Station where the two defendants were booked. He was asked if he had a conversation with Mrs. Ah Fook Chang on December 19th just before dinner time and he said he did while she was sitting in Inspector Richardson's office with her baby. That the witness had seen her around the Police Station during the day and the baby behaved "nicely" without crying or fussing. That he was in Mr. Richardson's office during the afternoon for a short while during the questioning of the defendants. That from that time he didn't hear anybody threaten Mrs. Ah Fook Chang to the effect that if she didn't sign the paper "they wouldn't let her go to rest or go to rest with her baby". He didn't hear anybody tell her that unless [106] she signed the

(Testimony of Antone B. Pacheco.)

paper her boy would be put in jail for twenty-five years. That he saw the woman nursing her baby during the afternoon. That just before supper time he had a conversation with her in which she told him "that a fellow from Honolulu had wrote to her on Maui for her to send her son to Honolulu to get these two packages and that she would meet him on Maui and then they went to Hilo and that's how she got in trouble." That the witness then told Mr. Wells, he was outside of the office at the time, about this conversation "and Mr. Wells went in and took care of it". That after dinner the witness was not present during any of the questioning. That during the questioning in the afternoon he didn't hear anybody making any promise that if they talked they wouldn't be prosecuted or anything like that.

MR. C. T. STEVENSON

about to be called as the next witness for the government, it was stipulated that if called he would testify that he received the suitcase, the tins of opium, the paper boxes, the notebook and steamer ticket, all later being admitted in evidence in this case as plaintiff's exhibits G, C, D, F and E. That there were twelve tins in each box of opium, one from each box having been taken out for use in making tests to determine contents.

MR. WILLIAM K. WELLS,

the next witness called for the plaintiff, testified that he had been a federal narcotic agent since 1921 and came to Hilo December 19th, 1935, by plane at the request of his superior, Mr. Stevenson, arriving about 2 P. M. on that day. After his arrival he questioned both defendants beginning about three or four o'clock in the afternoon in Inspector Richardson's office in the Hilo Police Station. That he first questioned Robert Chang and later Mrs. Ah Fook Chang. That Investigator Pearson warned them first and told them they didn't have to make any statement that could be used against them. Later on the witness said he told them the same thing. That he made no promise to either of the defendants. Asked if either [107] of the defendants asked him to assist either one of them, he said the mother did; that "she kept telling me to help her son, not to put her son in jail". I told her I couldn't do that, I didn't have anything to do with it and that I couldn't make any promises. That during the questioning he talked to her in a low regular voice such as he was using on the witness stand, which the judge referred to as a conversational tone. The windows of the room in which these questions were being asked were open and sometimes the door was open. That the witness did most of the questioning though he was assisted by Mr. Richardson and Mr. Pearson. That in the afternoon, the defendants each made a statement in which they denied they had anything to do with the opium. That just before

(Testimony of William K. Wells.)
dinner he had a conversation with Mr. Pacheco, which dealt with a conversation the latter had had with Mrs. Ah Fook Chang. He was shown a notebook and said that it had been handed to him by Mr. Pearson and Robert Chang had acknowledged that it was his. He was shown a page in the book with the name "Hong Yin Pin" written across it, and said that that name was written in it when he received it. The witness said that the defendant admitted that he wrote the name "Hong Yin Pin" in the book. That after dinner he questioned the two defendants again. He denied that at any time during the afternoon or evening that he or anyone in his presence told the woman defendant that unless she signed the paper she wouldn't be permitted to rest with her baby, or that unless she signed a paper her boy would go to jail for twenty-five years. The witness said that "the baby wasn't crying when we questioned Mrs. Chang. It seemed a very quiet baby". That she nursed the baby several times while being questioned. That he left Hilo Sunday, December 22nd, and that Mr. Pearson turned over to him the evidence that was seized in the case. That upon his arrival in Honolulu he turned the articles received from Mr. Pearson to District Director Stevenson and they are now in the same condition when he turned them over to Mr. Stevenson as [108] when he received them. He identified a paper of the Inter-Island Steamship Company, which he said was found in Robert Chang's suitcase and Robert Chang had said that's the receipt he got from the

(Testimony of William K. Wells.)

Inter-Island from Kahului to Honolulu, having reference to the Inter-Island Steamship Company. That on the evening of December 19th, he took a statement from both Mrs. Chang and Robert Chang. That he took altogether three statements from Robert Chang, the first in the afternoon before dinner and the second after dinner and the third and last one later at night. The first and second statements weren't completed but the third statement was his final statement in which he acknowledged complicity in connection with the opium found in his room. When this statement was finished, it was handed to him and he read it. "There were a few words he didn't understand and we got him right on it", which the witness said were explained to him warning him of his constitutional rights and he was asked if he would sign it and he said he would and he signed it.

Q. Now calling your attention to the writing on the reverse side of the second page at the top of which appears the date "December 20th, 1935" where was that taken?

A. That was taken up in the city jail.

Q. That is, up mauka, up Waianuenue?

A. Yes sir. We slipped up that night on these questions, so I went up there the following morning with Officer Takemoto, and, in the presence of Jailor Rosehill, I questioned defendant Robert Chang, and after I got through—I let him read the statement, asked

(Testimony of William K. Wells.)

him if it was true, he said "Yes", and I asked him to sign it, and he signed it.

The witness said that the defendant was not threatened in any way in the taking of these statements by him or by anybody else in his presence. That he told defendant he didn't have to say anything; he didn't have to sign if he didn't want to.

(Exception No. 7):

Immediately thereafter the following proceedings were had: [109]

Mr. MOORE: At this time we offer United States Exhibit 7 for Identification, in evidence.

The COURT: What is it?

Mr. MOORE: It's the statement of Robert Chang.

Mr. BOTTS: We object to it on the ground that it purports to be a confession that was obtained while defendant was under illegal restraint and was not voluntarily given within the meaning of the law, and amounts to a violation of the defendant's rights under the Fourth and Fifth Amendments of the Constitution, and the 14th Amendment of the Constitution; that it was obtained coercively.

The COURT: Are you through with your objection?

Mr. BOTTS: Yes sir.

The COURT: The objection is overruled; the exhibit will be admitted.

Mr. BOTTS: May the record show we note an exception?

The COURT: Let the exception be noted.

The statement of defendant,

ROBERT CHANG,

having been admitted in evidence, the same was read to the jury in words and figures as follows: (U. S. Exhibit "A"):

"Statement of Robert Chang alias Yuk Moon taken in the Hilo Police Station by Narcotic Agent William K. Wells at 8:30 P. M. December 19th 1935.

Q. What is your name?

A. Robert Chang alias Yuk Moon.

Q. Where do you live?

A. Vineyard Street, Waialuku, Maui.

Q. When did you come to Hilo?

A. December 18, 1935.

Q. Did you sail from Maui or Honolulu?

A. Honolulu.

Q. How did you come to leave Honolulu for Hilo instead to Maui?

A. I left Maui on the 16th of December 1935 went to Honolulu and left for Hilo on the 17th of December 1935 arriving in Hilo on the morning of the 18th, 1935.

Q. Why did you go to Honolulu?

A. My mother asked me if I wanted to go to Honolulu to bring some opium to Hilo, so I went and she gave me $50.00 for my expenses I was to go to the Oahu Garment Co. on 78 N. King Street and to look for a man by the name of Hong Yin Pin, and he was to give me this stuff. (In this blue note book found in your

(Testimony of Robert Chang.)

dress suit case the name of Hong Yin Pin is written in it is this the man you was to see yes, book shown to Robert Chang with the name of HONG YIN PIN" written in it and identified by him as being his property.)

Q. Did you meet this man?

A. I met a man I do not know who he was and I showed an envelope with Chinese and Haole written on it I [110] asked him is that your name, he said yes and wanted me to give him the envelope and I tore it up. Then he said when you want the stuff, I said by 1:30 in the afternoon he told me to follow him but I did not want to so he told me to meet him at the corner of Kukui and Nuuanu Avenue and at Flower shop which is on the corner, I waited there a long time in a taxi, then he came to my car and signal me to come I followed him and he took me to a house upstairs to his room and told me to wait there and he would telephone for the stuff. Then he left me and I was alone in the room and his pictures were on the wall. Then he came back and asked me for the money so I told him that I could not give him the money then he said we go downstairs then we went in the back of the flower shop and the two packages wrapped in Xmas paper were there then he said give me the money I took the envelope which I had in my pocket and opened it before I had it opened he told me to give it to him and I gave it to him. Then he told me to go.

(Testimony of Robert Chang.)

Q. Did he tell you where to bring this stuff to Hilo?

A. I don't remember.

Q. Then where did you go?

A. I went to my friend's house by the name of Henry Ching, my suit case was in the parlor and I put one package in the suitcase and one I held in my arm, then I went to the boat.

Q. Did you see your mother on the boat at Mala that night?

A. Yes.

Q. Did you talk with your mother that night on the boat?

A. Yes.

Q. Did you and your mother stay at the same hotel when you arrived at Hilo?

A. No.

Q. Did you come to Hilo town alone or with your mother from the boat?

A. I came alone.

Q. Where did you go and stay in Hilo?

A. Mauna Kea Rooms.

Q. What time was Mrs. Chun Doon supposed to come and get the stuff?

A. I don't know sometime around 7:00 P. M.

Q. How much money did you deliver to Hong Yin Pin in Honolulu?

A. I do not know how much money was in the envelope.

Q. Who gave you this envelope containing the money?

(Testimony of Robert Chang.)

A. Dang Wing Kong, at his house in the back of the Public Service Station, Wailuku, Maui.

Q. What was his instructions to you?

A. He told me to go to 78 North King Street Oahu Garment Company and see a man by the name of Hong Yin Pin and to be sure that I was to see Hong Yin Pin personally, then he gave me two envelopes one containing money and the other Hong Yin Pin's address, then I sailed for Honolulu.

Q. When you arrived in Honolulu what did you do?

A. I went to the Oahu Garment Company and went downstairs and asked a Chinese man if he was Hong Yin Pin he said no he is upstairs so I went upstairs and found Hong Yin Pin and I gave him an envelope and gave him [111] the code word given me by Dang Wing Kong, then I went upstairs with Hong Yin Pin and he showed me his cloth material then he told me to come up later to the corner of Kukui Street and Nuuanu Avenue at a flower shop and wait for him there.

Q. Who paid your expenses for this trip?

A. Dang Wing Kong he gave me $50.00.

Q. What else did Dang Wing Kong tell you?

A. He told me that if I got the money for Mrs. Chun Doon ($3,000.00) to take it back to him.

(Testimony of Robert Chang.)

Q. In the first part of this statement you stated that your mother gave you the $50.00 for your expenses is that true or not?

A. No, that is not true, Dang Wing Kong gave me the money in Maui.

(Sgd) ROBERT CHANG
(ROBERT CHANG alias
YUK MOON)

Subscribed and sworn to before me this 19th day of December, A. D. 1936.

(Sgd) WILLIAM K. WELLS
(Sgd) WM. J. MARTIN
Witness.
(Sgd) JOHN B. DEMELLO."

Said U. S. Exhibit "A", which was the confession of Robert Chang, having been read, the following proceedings were had:

(Exception No. 8):

Mr. BOTTS: At this time, if Your Honor pleases, there are references in this statement to a co-defendant. I ask that the jury be instructed that a confession, if admissible at all, is only admissible against the defendant who makes it and is only evidence against him;——

The COURT: That is the law.

Mr. BOTTS: And no references in that statement applying to Mrs. Ah Fook Chang may be considered by the jury as evidence against her.

The COURT: Mr. Wells, was Mrs. Ah Fook Chang present when this statement was made?

A. Yes sir.

The COURT: Made in her presence and hearing?

A. Yes sir.

The COURT: Did she take any part in the conversation whatever?

A. Several times there she kept telling the boy, "You tell the truth," "you tell the truth"; but the last part of that statement on the other side she wasn't present.

The COURT: Then, gentlemen of the jury, as to the statement made at the jail,—— [112]

Mr. MOORE: You mean, this one on the reverse side, that's on December 20th.

The COURT: (Continuing): Witness by Wells alone, may not properly be considered by you as evidence against the mother but only as against the boy. Only such statements as were made in the presence of the woman could at all be considered as evidence against her.

Mr. BOTTS: Now, if Your Honor pleases, where does that leave us?

Mr. MOORE: If you let me ask a couple of questions, Mr. Botts, I think I can clear this up.

Mr. BOTTS: All right.

Mr. MOORE: Mr. Wells, during and after this statement of Robert Chang that has now been admitted in evidence,—that's not with reference to the seizure, but the other one—was Mrs. Ah Fook Chang questioned as to the truth of that?

A. Yes sir.

Q. And what did she have to say in that regard?

A. She said that was the truth.

Mr. MOORE: Does that answer your question, Mr. Botts?

Mr. BOTTS: No. The previous testimony was that it was taken separately.

(Sotto voice discussion between counsel)

Mr. BOTTS: Well, I'll renew my motion, if Your Honor pleases, so there'll be no question about it. I ask that Your Honor instruct the jury that any statements made in that purported confession of Robert Chang can only be considered as against him and not as evidence in any way as against Mrs. Ah Fook Chang.

The COURT: Gentlemen of the jury, you will consider that as the instruction of the Court, with this exception; that where the statement was made in the presence and hearing of Mrs. Ah Fook Chang, it may be considered against her also.

Mr. BOTTS: To which we note an exception,——

The COURT: Let the exception be noted.

Mr. BOTTS (Continuing): on the ground that where one is under illegal restraint, unlawfully imprisoned, no duty is imposed upon him, where his fellow likewise is imprisoned, to say anything.

The COURT: That objection is also overruled.

Mr. BOTTS: Exception.

The COURT: Exception noted.

Thereafter the witness was shown a paper, which latter was put in evidence as U. S. Exhibit "B" and was asked if he had ever seen it before. He answered that this was the statement he took from Mrs. Ah Fook Chang December 19, 1935. That he started taking [113] it at 9:50 in the evening. He said the statement was typed out, but they questioned her for quite a while before it was typed; that after it was typed he read the statement to her and she read it and they asked her if it was true and she said "yes". He asked her if she would sign it and she said "All right" and she signed it and it was witnessed by Martin and De Mello and the witness. Said this statement was taken in the same manner as Robert Chang's statement was taken. At this point he offered the statement in evidence and the following proceedings were had:

(Exception No. 9):

> Mr. BOTTS: To the offer, if Your Honor pleases we respectfully object, on the following grounds: that it affirmatively appears that the statement was taken from this defendant Mrs. Ah Fook Chang while she was under illegal restraint and arrest, and the same was therefore obtained coercively and not voluntarily, and was therefore not a voluntary statement which can be used in evidence against her. We object to the admission of it, if Your Honor pleases, on the further ground that it appears from the statement itself that the defendant Mrs. Ah Fook Chang was not told immediately preceding

the taking of the statement that she need not make a statement if she didn't want to but that if she did make a statement it might be used against her in a criminal proceeding. In summary, we say that it affirmatively appears from all the evidence in this case that the statement was not the free and voluntary statement made by this woman, but was coercively obtained and amounts to an involuntary statement and an illegal search and seizure of the defendant's mind and memory, in violation of her rights under the 4th and 5th and the 14th amendments of the Constitution.

The COURT: While the Court realizes there is some authority to sustain these objections, the Court is of the opinion that the weight of the authorities is the other way. The objection is overruled in each respect.

Mr. BOTTS: May we note an exception to the ruling of the Court.

The COURT: Let the exception be noted. The exhibit will be admitted.

The statement of

MRS. AH FOOK CHANG

having been admitted in evidence the same was read to the jury in words and figures as follows: (U. S. Exhibit "B"): [114]

"Statement of Mrs. Ah Fook Chang taken in the office of the Police Inspector George J. Richardson at Hilo, Hawaii, on Thursday eve-

(Testimony of Mrs. Ah Fook Chang.)

ning December 19, 1935 at 9:50 P. M. by Narcotic Agent Wm. K. Wells in the presence of Capt. Wm. J. Martin, Geo. J. Richardson, John B. de Mello.

Q. What is your name?

A. Mrs. Ah Fook Chang alias Kam Yuen.

Q. What is your husband's name?

A. Ah Fook Chang.

Q. Where do you live?

A. Vineyard Street, Wailuku, Maui.

Q. When did you come to Hilo.

A. Yesterday morning, December 18, 1935.

Q. When you arrived in Hilo where did you go to stay?

A. Okino Hotel Kamehameha Avenue.

Q. Have you a son, by the name of Robert Chang?

A. Yes.

Q. Was Robert Chang, on the same boat with you when you came to Hilo?

A. Yes.

Q. Where did you get on the boat at Mala or Honolulu?

A. Honolulu.

Q. Did you know that Robert was going to be on that boat?

A. I was not sure, but I thought that he might be on the boat.

Q. Did you talk to your son Robert on the boat that night?

A. Yes, he came to my stateroom and we had a talk there.

(Testimony of Mrs. Ah Fook Chang.)

Q. Do you know why your boy was on the boat that night?

A. One day last week in Maui a man by the name of Dang Wing Kong came to my house and asked me if my son Robert wanted to go to Honolulu and get a package and bring same to Hilo I said that it was up to the boy if he wanted to I went home and asked Robert if he wanted to go to Honolulu and he said sure. Then I told him to go and see Dang Wing Kong.

Q. Who paid for Robert's expenses for this trip?

A. I did not see the money but Robert told me that Dang Wing Kong had given him the money.

Q. Who was your son to see in Honolulu when he got there?

A. I don't know but my son showed me an envelope with the address of the Oahu Garment Company and another envelope with the name of Hong Yin Pin on it.

Q. Who were you and your son going to deliver this opium to in Hilo?

A. To the wife of Chun Doon who has a store in Hilo by the railroad track.

Q. Did Mrs. Chun Doon write to you people to bring this opium up?

A. No, she wrote to Dang Wing Kong of Wailuku, Maui.

Q. What did Dang Wing Kong tell you to do when you get to Hilo?

(Testimony of Mrs. Ah Fook Chang.)

A. He told me that the opium was worth $3,000.00 and if she gave me the money to deliver the money to him personally.

Q. Is this all you know in regards to the 24 tins of opium brought to Hilo by your son Robert and yourself on December 18, 1935?

A. Yes this is all. [115]

Q. This statement that you make is the whole truth and nothing but the truth?

A. Yes.

(Sgd) MRS. AH FOOK CHANG.

Subscribed and sworn to before me this 19th day of December A. D. 1935.

(Sgd) WILLIAM K. WELLS.

Witness:

(Sgd) G. J. RICHARDSON.

(Sgd) WM. J. MARTIN.

(Sgd) JOHN B. DEMELLO."

(Exception No. 10):

The statement having been admitted in evidence, the following proceedings were had:

Mr. BOTTS: I now ask Your Honor to instruct the jury that any statements made in this statement Exhibit "B" in which Robert Chang's name appears in an incriminating way, that the jury be instructed that it is not evidence in any manner, shape, or form against Robert Chang and can only be considered against Mrs. Ah Fook Chang, and that the weight of this statement, that is, what value

if any the jury wants to place upon it, is solely within the purview of the exclusive power of the jury.

Mr. MOORE: We have no objections to the jury being so instructed, for the reason that with this particular statement there is no evidence that Robert Chang was asked whether or not this statement was correct. It appears with reference to the other statement that after it was completed and read to the defendant Robert Chang, the defendant Mrs. Ah Fook Chang was asked whether or not that statement, which is United States Exhibit "A", was correct, and she stated that it was; so that as to this particular statement we have no objections to the jury being instructed that, insofar as the defendant Robert Chang is concerned, it cannot be considered as against him. [116]

The COURT: Before ruling on this matter I'd like to ask the witness a question.

Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?

A. Yes sir.

Q. He heard the statement read to her?

A. He was sitting in the room on my right; Mrs. Ah Fook Chang was on the left of the table.

The COURT: It appearing that this statement was made in the presence of the defendant Robert Chang, the instruction will not be given.

Mr. BOTTS: Exception, if Your Honor pleases.

The COURT: Exception noted.

(Exception No. 11):

Thereafter the plaintiff offered in evidence as U. S. Exhibit "C" a box containing twelve tins of opium and the following proceedings were had:

Mr. BOTTS: We object to the admission of that evidence, Your Honor, it being apparent from the evidence that this was articles seized and taken from the defendant Robert Chang in pursuant of an illegal search and seizure, and we say that's inadmissible against him or the co-defendant, on the ground that the search and seizure was illegal and in violation of the defendant's rights under the 4th and 5th Amendments of the Constitution.

The COURT: That is the question that has previously been determined by the Court.

Mr. BOTTS: Yes, Your Honor. I asked, to protect my record.

The COURT: Yes; and it seems to the Court that the evidence given on this trial is even stronger in favor of a legal search than it was on a previous hearing.

Mr. BOTTS: We note an exception to Your Honor's comment as being improper in the presence of the jury.

The COURT: Let the exception be noted. The exhibits will be admitted over the objection of the defendant, the defendant being given the exception he desires.

Mr. BOTTS: And exception.

(Exception No. 12):

Thereafter the plaintiff offered in evidence as U. S. Exhibit "D" the remaining twelve tins of opium and the following proceedings were had:

[117]

Mr. BOTTS: We object to it on the ground that it's incompetent, irrelevant, and immaterial; that it affirmatively appears that the articles offered in evidence were the fruit of an illegal search and seizure as disclosed by the evidence and made in violation of the constitutional rights of Robert Chang.

The COURT: Same ruling as to the previous offer.

Mr. BOTTS: Exception.

The COURT: Exception allowed.

(Marked "U. S. Exhibit D").

(Exception No. 13).

Thereafter the plaintiff offered in evidence as U. S. Exhibit "E" an Inter-Island passenger identification check, which the witness, Wells, had testified the defendant identified as his receipt for passage on an Inter-Island Steamship from Kahului, Maui, to Honolulu on December 16, 1935, and the offer being made, the following proceedings were had:

Mr. BOTTS: We object to that, if Your Honor pleases, on the ground it's incompetent, irrelevant, and immaterial, having nothing to do with any of the issues in this case, obtained as a result of an illegal search and seizure, and not properly identified.

The COURT: The objection is overruled. The exhibit will be admitted.

Mr. BOTTS: Exception.

The COURT: Let the exception be noted.

(Marked "U. S. Exhibit E").

(Exception No. 14):

Thereafter the plaintiff offered in evidence as U. S. Exhibit "F" a small notebook on one of the pages of which "Hong Yin Pin" was written, being the notebook which the witness Wells said Robert Chang admitted belonged to him, indicating that said notebook was found in Robert Chang's suitcase and said book being offered the following proceedings were had:

Mr. BOTTS: We object to the offer, if Your Honor pleases, on the ground that it's incompetent, irrelevant and immaterial, remote, and having no bearing on the issues here, and obtained as a result of an illegal search and seizure.

The COURT: The objection is overruled. The exhibit will be admitted.

Mr. BOTTS: Exception. [118]

(Exception No. 15):

Thereafter the plaintiff offered in evidence as U. S. Exhibit "G" the suitcase, together with the Christmas wrapping paper that was around the packages at the time of seizure and identified it as being the same articles found in room 10 of the Maunakea Rooming House and as the property of

the defendant, Robert Chang, and this offer having been made, the following proceedings were had:

Mr. BOTTS: The same objection, Your Honor, on the ground that it was obtained as a result of an illegal search and seizure, and incompetent, irrelevant and immaterial.

The COURT: Same ruling.

Mr. BOTTS: Same exception.

The COURT: Let the exception be noted.

(Marked "U. S. Exhibit G").

On cross-examination, the witness was asked the words in the statement (U. S. Exhibit "A") that Robert Chang did not understand. The witness explained that Robert Chang did not know what was meant by the word "statement" and he said he was quite sure that the other thing he didn't understand was the question "What was his instructions to you?" The witness said he did not believe that Robert Chang understood what the word "instructions" meant. The witness said that when they arrested a narcotic offender in Hilo, they took him to the Police Station and if he couldn't make bond, they lodged him in jail. He said they finished Mrs. Ah Fook Chang's statement between half past ten and eleven o'clock. That they didn't purport to take the statement down in longhand or shorthand, but they attempted to merely put down the substance of what was said. He was asked:

Q. So what you've attempted to do here is to put the skeleton of what he said in this statement?

A. Yes sir.

Q. And you make no pretense of having taken it down in shorthand or anything of the sort?

A. No sir. [119]

He said he took three statements from Mrs. Chang, the first was taken when he arrived about two or three o'clock in the afternoon, in which she denies all complicity in the transaction and the second statement was taken later in the afternoon, just after dinner-time when she again denied all complicity in the matter and the third and last statement began about 9:50. That he took the same number of statements from Robert Craig.

On redirect he said that when he took the statements, the Clerk DeMello was sitting at the typewriter; that he would ask the question, get the answer and then he would type the substance of both question and answer. After it was all typed out it was read out to the defendant, then defendants were permitted to read the statements and in conclusion they signed them. He said he had questioned Robert Chang about the little blue book (U. S. Exhibit "F") on the day he arrived in Hilo, December 19th.

On recross examination, he said that Mrs. Chang did not ask to have any words explained to her. That he questioned her about her family and she said she was married to Ah Fook Chang of Maui and had seven or eight children, one of them, the infant, being with her.

(Exception No. 16):

The plaintiff having rested, the following proceedings were had:

Mr. BOTTS: We ask at this time, if Your Honor pleases, that the sworn testimony of Mrs. Ah Fook Chang and Robert Chang, given on Monday in this Court in connection with a motion relating to these statements, be considered as evidence in this case and read by the court reporter to the jury.

Mr. MOORE. May it please the Court, I object to that, for this reason. That the statements of Robert Chang and Mrs. Ah Fook Chang, given on Monday in this Court, were confined and limited considerably, [120] and the United States was not permitted the scope of cross-examination that would be permitted in the case of the actual trial. So that, if those are to be read in evidence in this case I would ask leave then to be permitted to cross-examine each of these witnesses further.

Mr. BOTTS: Counsel has cross-examined, Your Honor; and the testimony in question is evidence adduced in this Court under oath. We claim that the constitutional rights of these defendants were invaded, and they have a right to have that issue presented to the jury independently of the question of their actual complicity in this opium transaction.

The COURT: It will be the duty of this Court later to instruct this jury that they have

a right to consider the appearance and demeanor of these witnesses on the stand.

Mr. BOTTS: That doesn't make any difference, Your Honor; we have sworn testimony here that is properly adducible before this jury.

The COURT: The jury were not present to see the witnesses' demeanor at that time.

Mr. BOTTS: No, but the witnesses were duly sworn. We offer it.

The COURT: For the purpose of the motion it would be sufficient; but the Court feels in this case if the defendants want the testimony of these witnesses it should be produced before the jury.

Mr. BOTTS: Will Your Honor rule?

The COURT: That could not be done without a stipulation and counsel refuses to stipulate.

Mr. MOORE: May it please the Court, we don't want to prevent coming before this jury any testimony that these defendants wish to offer in this case. We're not willing to take and put into this record just the evidence that these defendants want. We claim that we have a right, if this evidence is to be considered by this jury, to cross-examine these defendants upon the case in chief, in addition to the limited cross-examination that was permitted and was permissible at the time when the testimony was given which the defendants now seek to have put in this case.

Mr. BOTTS: That's where counsel is in error, if Your Honor pleases. We have an isolated issue here of a confession and the legality of that confession——

The COURT: Which is a question for the Court.

Mr. BOTTS: It is, in the first instance; but after Your Honor has passed upon it, then it becomes a question for the jury as to what weight they will attribute to that; they have a right to wholly disregard that, and I have a right to so argue to them. [121]

The COURT: The Court does not agree with that view, Mr. Botts, and would have to be shown authorities before it would accept such a view.

Mr. BOTTS: There are ample authorities, Your Honor. Your Honor can only rule that a confession is admissible. After it is admissible Your Honor cannot invade the province of a jury, which is to weigh all the evidence; they can give that evidence just exactly the weight they want to, and Your Honor will instruct the jury that when it comes to weighing the evidence they are the exclusive judges of it, and Your Honor nor I cannot take away from the jury any part or particle of that power.

The COURT: The jury will be so instructed by this court.

Mr. BOTTS: Will Your Honor rule on the offer please?

The COURT: I thought it had been ruled on.

Mr. BOTTS: No, Your Honor.

The COURT: The Court has stated before and will repeat that if you wish the testimony of these defendants you should produce them on the stand at this time.

Mr. BOTTS: We wish the testimony given on the issue of the facts and the propriety surrounding the taking of the confessions, sworn testimony taken in open court before Your Honor.

The COURT: In the case of an appeal you would have the benefit of that testimony on the appeal. The witnesses cannot be taken before the appellate court, but they can be produced before this Court, that is, before this jury, whose duties as you now contend for are even larger than the Court had assumed.

Mr. BOTTS: Your Honor hasn't ruled.

The COURT: If that's the nature of an offer, the offer will be denied.

Mr. BOTTS: I want the record to show that, if there's any doubt about it, it is in the nature of an offer. I am offering in evidence—and I believe I used that language—the testimony taken on Monday in this court of Mrs. Ah Fook Chang and Robert Chang touching the statements which have been admitted in evidence here, obtained from them on December 19th, 1935, being Exhibits "A" and "B" for the Government; and the offer is that the court

reporter be requested to read that evidence to the jury. I understand Your Honor has denied the offer?

The COURT: Yes, that's the ruling of the Court.

Mr. BOTTS: May the record show I note an exception?

The COURT: Exception is allowed.

Thereupon the defendants closed their case. [122]

The foregoing presents, in substance in narrative form, except such portions as have been set out as excerpta, all the evidence in the trial of this cause.

Whereupon counsel presented their closing arguments to the jury.

Thereupon the Court read its written instructions to the jury as follows:

"Instruction No. 1.

"You are instructed, Gentlemen of the Jury, that the offenses alleged to have been committed in this indictment are charged to have been committed by two defendants, i.e., Mrs. Ah Fook Chang alias Kam Yuen and Robert Chang alias Yuk Moon. In your consideration of this case you are to weigh the evidence for the purpose of determining the guilt or innocence of each of said two defendants, and each of the two offenses charged in said indictment."

"Instruction No. 2.

"You are instructed that, under the law, 'When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts'. The indictment in this case was framed relying upon the provisions of the law above quoted, and in it there are two charges which, under the technical term employed in the legal parlance, are called 'counts'. Each of said two counts constitute a separate and distinct charge covering separate and distinct crimes, although, as you will note from an examination of said indictment, both of said crimes are alleged to have been committed at the same time and place, to-wit: On or about the 18th day of December, 1935, at Hilo, County of Hawaii, Territory of Hawaii. In drawing the indictment the United States Attorney incorporated in each of the counts of said indictment material language found in the different sections of the law it is said was violated and indicating clearly what each particular violation consists of, the first count charging a violation of what is properly known as 'The Narcotic Drugs Import and Export Act' and the

second count charging a violation of what is properly known as 'The Harrison Narcotic Act'. [123]

"Each of said counts constitute a separate and distinct offense, and each should be considered by you the same as though there was a single indictment as a basis of this action, and the guilt or innocence of each of the defendants is to be determined as to each count and in accordance with the law as given you in all of the instructions herein, each of said instructions to be fully applied to each and every count of the indictment and as to each defendant now on trial.

"You are further instructed that where a count of the indictment charged two or more acts as constituting the offense, it is not necessary that you should find the defendants to have committed all of said acts in order to find them guilty of the offense charged, but that it is sufficient if you find from the evidence that they committed any of the said acts as charged.

"By way of illustration: The first count charged that said defendants did (1) receive, (2) conceal, (3) buy, (4) sell, etc. etc. It is not necessary that the Government should prove that defendants did all four of said acts with regards to said 70,008 grains of opium, but the Government has met the requirement of the law if it proves defendants did any one

of said four things; likewise, in the second count of the indictment, defendants are charged with having purchased, sold, dispensed and distributed said 70,008 grains of opium. To meet the required burden as to this count, the Government need only prove in the manner required by these instructions that defendants did any one of said alleged acts."

"Instruction No. 3.

"The indictment in this case is in no sense evidence or proof that the defendants have committed the alleged crime, but is merely a formal allegation, required by law, alleging that the crime was committed in the form and manner therein set forth, and no juror should suffer himself to be influenced in any degree by the fact that this indictment has been returned against the defendants."

"Instruction No. 4.

"A criminal prosecution begins with the presumption that the defendant, although accused, is innocent, and that to overcome this legal presumption the evidence must be clear and convincing and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty. The presumption of innocence is evidence created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to over-

come the proof which the law has created. The [124] benefit of this presumption attends the accused at every stage of the proceedings and stands as his sufficient protection unless and until it has been removed by evidence proving his guilt beyond a reasonable doubt."

"Instruction No. 5.

"A reasonable doubt is the condition of mind produced by the proof resulting from the evidence in the case. It is an honest, substantial misgiving, founded upon reason, generated by the proof or lack of proof and resulting solely upon evidence in and not outside of the case, so the reasonable doubt to which every defendant is entitled must likewise be founded upon evidence in the case or upon a lack of evidence. It is such a state of the proof as fails to convince your judgment and conscience and satisfy your reason of the guilt of the accused. If the whole evidence when carefully examined, weighed, compared and considered, produces in your minds a settled conviction or belief of the defendant's guilt—such an abiding conviction as you would be willing to act upon in the most weighty and important affairs of your life —you may be said to be free from any reasonable doubt and should find a verdict in accordance with that conviction or belief. But if you still retain in your mind a reasonable doubt of the guilt of the defendants, it is your duty to vote for an acquittal."

"Instruction No. 6.

"The first count of the indictment alleges a violation of the Narcotic Import and Export Act, the material parts of which are as follows:

" 'If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall * * * be punished. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' Sec. 174, Title 21 U. S. C. A.

"Your attention is invited to the above statutory rule of evidence relative to the effect of proof of possession. [125]

"These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove beyond a reasonable doubt that the defendants knowingly had narcotic drugs (in this case opium) in their possession, when the presumption at once arises

that it had been imported contrary to law, and such possession whenever same is shown would impute to the defendants possessing such drug a guilty knowledge of such illegal possession sufficient to warrant a conviction, unless defendants shall explain such possession to the satisfaction of the jury, but if the defendants do so explain such possession to your satisfaction they are entitled to an acquittal."

"Instruction No. 7.

"Count 11 of the indictment charges a violation of what is commonly known as the Harrison Narcotic Act, the material parts of which are as follows:

" 'It shall be unlawful for any person to purchase, sell, dispense or distribute any 'cocoa leaves or any compound, salt, derivative or preparation thereof produced in or imported into the United States' except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession it may be found.' Secs. 1040A & 1043A, Title 26, U. S. C.

"Your attention is invited to the rule of evidence under this statute that drugs are only permitted to be sold in or from the original stamped package, and that if you find and believe from the evidence, beyond a reasonable

doubt, that these defendants, or either of them, had possession of the drugs and there were no tax paid stamps upon them, then prima facie presumption immediately arises that the defendants, or either of them, who had such possession unexplained, violated this law."

"Instruction No. 8.

"In this case the burden of proof is upon the United States, and, to entitle it to a conviction of the defendants, the United States must prove every material element of the offense, to the satisfaction of each member of the jury and beyond a reasonable doubt. If any of you entertain a reasonable doubt of the defendants' guilt as to any material element of the offense, it is your sworn duty to vote for an acquittal as to such offense, otherwise to vote for conviction." [126]

"Instruction No. 9.

"If you can reconcile the evidence with any reasonable hypothesis consistent with the defendants' innocence, it is your duty to do so and in that case to find them not guilty, for every reasonable doubt is to be resolved in favor of a defendant, and it is not sufficient that the circumstances coincide with, account for and therefore render probable the guilt of the defendants. They must exclude to a moral certainty every other reasonable hypothesis."

"Instruction No. 10.

"If, after careful consideration of all the evidence in the case and after calm and dispassionate reasoning with other jurors, any juror arrive at a definite conclusion as to the guilt or innocence of the defendants, then such juror ought not change such conclusions solely for the reason that some jurors have arrived at the opposite conclusion."

"Instruction No. 11.

"You are instructed that in every crime, as in this case, there must be an intent on the part of the defendants to commit the crime and if you are not satisfied beyond all reasonable doubt that the defendants had the intent to commit the crime alleged in the indictment, then your verdict must be not guilty; in this connection, however, you are instructed that, under the law, a person is always presumed to intend the natural and probable consequences of his acts."

"Instruction No. 12.

"The Court further instructs you, Gentlemen of the Jury, that you are the exclusive judges of the credibility of the witnesses, of the weight of the evidence and of the facts in this case. It is your exclusive right to determine from the appearance of the witnesses on the witness stand, their manner of testifying, their apparent candor or frankness, or lack thereof,

which witness or witnesses are more worthy of credit, and to give weight accordingly. In determining the weight to be given the testimony of the witnesses, you are authorized to consider their relationship to the parties, if any; their interest, if any, in the result of this case; their temper, feeling or bias, if any has been shown; their demeanor on the witness stand; their means and opportunity of information and the probability or improbability of the story told by them.

"If you find and believe from the evidence that any witness in this case has knowingly or wilfully sworn falsely to any material fact in this trial, or that any witness has knowingly and wilfully exaggerated or suppressed any material fact or cir- [127] cumstance in this trial for the purpose of deceiving, misleading or imposing upon you, then you have a right to reject the entire testimony of such witness, except insofar as the same is corroborated by other credible evidence or believed by you to be true."

"Instruction No. 12-a.

"You are instructed that there has been admitted in evidence in this case alleged confessions of each defendant, and that each of these confessions were alleged to have been made in the presence of each of the defendants.

"The Court instructs you that a confession of guilt should not be considered if it was not

free and voluntary but procured through influence of threats or the promise of favor, or other circumstances which might render it involuntary. But a free and voluntary confession is generally deserving of the highest credit because it is against the interest of the person making it and is presumed to flow from a sense of guilt.

"You are further instructed that a confession of this character should be received with caution and defendants should not be convicted upon the evidence of such confessions alone, unless supported by other proof in the case."

"Instruction No. 13.

"Finally, Gentlemen of the Jury, if after deliberately considering all the facts and circumstances in the case and carefully weighing the evidence and considering in connection therewith the various presumptions and statutory rules of evidence as outlined, you find from the evidence and to your satisfaction beyond all reasonable doubt the allegations in the indictment have been established, it is your duty to return a verdict of guilty, otherwise it is equally your duty to return a verdict of not guilty."

And in addition thereto, the Court gave from the Bench an oral instruction or interpolation as follows:

"Now gentlemen, it was in connection with this instruction that the Court wishes to inter-

polate something. This instruction was drawn in conference this morning between the respective counsel in this case and the Court, and is taken largely from a decision of the Supreme Court of the United States and represents the law. No comment would be made were it not for the fact that both counsel endeavored to define to you exactly what would constitute a voluntary confession. [128] Mr. Botts said it would have to be free from urging and improper influence; that's a half-truth. It would have to be free from improper influence to be voluntary, but it wouldn't have to be free from urging, as the Court believes an instruction of the law to be. Mr. Moore said a confession might be voluntary even though the person at the time of making it was shackled. That is, too, a half-truth. Mere shackling would not make it involuntary, but if he was shackled in such a manner as to cause physical or mental suffering it would then become involuntary. This instruction was not given for this case alone, but would be the law in any case where confessions were offered, just as the previous instructions which have been read are law applicable to all other criminal cases involving like questions. (Reading): Finally, gentlemen of the jury . . . One further instruction, given at the request of the Plaintiff. You are instructed whoever directly commits an act constituting an offense defined in any law of the United States, or aids, abets,

counsels, commands, induces, or procures its commission, is a principal.

"That is simply quoting a section of the law, known as Section 55c of Title 18 in the United States Code."

The foregoing instructions include all the instructions or charges given by the Court.

(Exception No. 17):

Before the jury retired, defendants noted an exception to one of the instructions given by the Court (No. 12-a) and to the refusal of the Court to give instructions requested by the defendants and the following proceedings were had:

Mr. BOTTS: If Your Honor pleases, before the jury retire, and for the purpose of the record, may I be permitted to note an exception, Your Honor, and also the instruction given by Your Honor, number 12-a; we except to 12-a, if Your Honor pleases, upon the ground that it fails to define the meaning of the term "voluntary" or meaning of the term "involuntary", and the jury is left without any guide or standard on that subject. We asked Your Honor to give our requested instruction No. 1, which Your Honor refused to do, and we now except to Your Honor's refusal, on the ground that the instruction properly defined the term "voluntary" and would give the jury a yardstick by which they could measure the confessions from that standpoint; without giving that instruction the jury is without any such guide." [129]

(Exception No. 18):

Instruction No. 1, requested by defendants and refused, was in the following words, to-wit:

"Instruction No. 1

"I instruct you, Gentlemen of the Jury, that there has been admitted in evidence what purports to be written confessions by the defendants herein.

"In this connection, I instruct you that a confession, to be considered as evidence against a defendant in a criminal case, must be one freely and voluntarily made by such defendant. When we use the word "voluntary" in this connection, we mean that the confession must have been made of defendant's free will and accord, without coercion, promise or inducement or by the method known as sweating. The word "voluntary" essentially includes in its meaning the freedom of choice as well as the exercise of the defendant's will without constraint by any force or influence. If, in this case, you believe from the evidence and the facts surrounding the incarceration of these defendants that either of the two purported confessions admitted in evidence herein was not voluntarily made, within the meaning of that word as defined in this instruction, or if you have a reasonable doubt on the point, you should totally disregard, in your deliberations, such confession."

And said exception to the giving of the Court's Instruction No. 12-a and the refusal to give defendants' Instruction No. 1 was duly noted and allowed.

(Exception No. 19):

The defendants requested the Court to give Defendants' Requested Instruction No. 2, which reads as follows:

"Instruction No. 2.

"I instruct you, Gentlemen of the Jury, that in considering whether or not the confession made by Mrs. Ah Fook Chang was voluntarily made within the meaning of this term as heretofore defined in these instructions, it is your right and duty to take into consideration the period, circumstances and duration of her arrest, confinement and detention and the fact that she had, previously to the making of said confession, made at least two [130] other statements in which she denied all guilt and complicity in the matters and things set forth in the final purported confession which was obtained from her, as well as all other facts and circumstances surrounding the taking and making of said alleged confession."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 20):

That defendants requested the Court to give Defendants' Requested Instruction No. 3, which read as follows:

"Instruction No. 3.

"I instruct you, Gentlemen of the Jury, that confessions in criminal cases of this kind are received with great caution. They are easily fabricated and the detection and exposure of their fallacy is often difficult. In the consideration and determination of the credibility of confessions, or the effect and weight to which they are entitled, the jury must look to all the facts and circumstances under which they were made."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 21):

That defendants requested the Court to give Defendants' Requested Instruction No. 5, which reads as follows:

"Instruction No. 5.

"I instruct you, Gentlemen of the Jury, that a confession obtained from a person held under illegal restraint or unlawful arrest and confinement is per se an unlawful search and seizure and is not competent evidence against the person making the same.

"If, therefore, you find and believe from the evidence in this case that the confession produced, offered and received in evidence by the government was obtained from Mrs. Ah Fook Chang while she was under illegal and unlawful restraint and confinement it will be your duty

to entirely disregard the same in considering your verdict in this case.

"And the same is true with reference to the purported confession of Robert Chang." [131]

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 22):

That defendants requested the Court to give Defendants' Requested Instruction No. 6, which reads as follows:

"Instruction No. 6.

"The court instructs the jury, that it was the duty of the officers who arrested defendants in this case, to have brought them before the United States Commissioner at Hilo, or local magistrate, without unnecessary delay, that they might speedily be advised of the accusation against them and be permitted enlargement on bail.

"I further instruct you, as a matter of law, that failure on the part of an arresting officer to bring an arrested person with reasonable dispatch before a commissioner or magistrate, for the purposes mentioned in this instruction, renders the detention and imprisonment of the arrested person unlawful."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 23):

That defendants requested the Court to give Defendants' Requested Instruction No. 7, which reads as follows:

"Instruction No. 7.

"I further instruct you, Gentlemen of the jury, that an arresting officerd has no legal right to hold an accused in jail without charge, for the purpose of investigating the crime he is believed to have had a part in, or to procure a confession from him. Detention for such purpose or purposes is illegal."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 24):

That defendants requested the Court to give Defendants' Requested Instruction No. 8, which reads as follows: [132]

"Instruction No. 8.

"I further instruct you, Gentlemen of the Jury, that if you believe from the evidence that the defendants in this case were held in confinement without charge and without opportunity to make bail, for an unreasonable length of time, considering the availablity of a United States Commissioner, then I instruct you as a matter of law their detention and imprisonment was improper and illegal."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 25):

The defendants requested the Court to give Defendants' Requested Instruction No. 9, which reads as follows:

"Instruction No. 9.

"I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders such confession involuntary as a matter of law and inadmissible against him on his trial for the criminal offense suggested in the confession."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed.

(Exception No. 26):

The defendants requested the Court to give Defendants' Requested Instruction No. 10, which reads as follows:

"Instruction No. 10.

"And I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders a confession thus obtained invalid and

inadmissible against him. A confession thus obtained is an invasion of defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution. These Amendments shield and protect him, not only in the lawful enjoyment of his tangible possessions, but also in the possession of the secrets of his mind."

To the refusal of the Court to give said instruction, defendants duly excepted and said exception was allowed. [133]

The jury having been instructed they retired to consider their verdict.

Thereafter the following proceedings were had as appears from the Affidavit of E. J. Botts, attorney for defendants, and certified as correct by the Trial Judge.

[Title, Court and Cause Omitted.]

"AFFIDAVIT FOR DIMINUTION OF THE RECORD.

"United States of America,
Territory of Hawaii—ss.

"E. J. BOTTS, being first duly sworn, on oath, deposes and says:

"That he is the attorney for the defendants above named; that the above entitled matter was submitted to the jury, for its verdict, at approximately 12 o'clock noon, February 19th, 1936; that a little after 5 o'clock the jury still deliberating the foreman came to the chambers

of the presiding Judge, Honorable S. C. Huber, and in the presence of affiant and Willson C. Moore, Assistant United States District Attorney, conducting the prosecution, informed the judge that the jury wished to be advised if the confession of one defendant in the case could be considered as evidence against the other; that affiant requested the court to inform the foreman that a confession in the case was only evidence against the party making it, notwithstanding that a co-defendant was present when the confession was being made; but the judge over defendants' exception adhered to the instruction given the jury in the course of the trial, viz, that a confession made by one defendant in this case could be considered by the jury as evidence against the other; that thereupon the foreman retired and a few moments later the jury returned to the court room, with a verdict against both defendants; that neither clerk nor court reporter was present during the proceedings above recounted in the judge's chambers.

"And further affiant saith not.

(sgd.) E. J. BOTTS

Subscribed and sworn to before me, this 24th day of Feb., 1936.

[Seal] (Sgd.) GLADYS K. BENT,
Notary Public, First Judicial Circuit, Territory of Hawaii. [134]

"CERTIFICATE OF PRESIDING JUDGE.

"I certify that the facts set forth in the foregoing affidavit are true and correct.

(Sgd.) S. C. HUBER,
Judge, United States District Court, in and for the District and Territory of Hawaii."

(Exception No. 26):

That thereafter, the jury having returned a verdict against defendants on both counts of the indictment, a motion for a new trial was duly filed in the above entitled matter on the 20th day of February, 1936, said motion for new trial being in words and figures as follows:

[Title, Court and Cause Omitted.]

"MOTION FOR NEW TRIAL.

"Comes now MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON, defendants above named, and move that the verdict of the jury herein be vacated and set aside and that they have a new trial herein upon the following grounds:

I

"Errors of law committed by the trial court in the admission of incompetent, irrelevant and immaterial evidence by the United States prejudicial to these defendants.

II.

"Errors of law committed by the trial court in the exclusion of relevant and material evidence offered by the defendants.

III.

"Errors of the trial court in refusing to give instructions requested by defendants, to which refusal exceptions were duly taken, and giving a certain instruction to the jury, objected to by defendants and to giving of which instruction defendants duly excepted.

IV.

"Error of the trial court in denying the motion of defendant, Robert Chang, alias Yuk Moon, for the suppression of the evidence obtained as a [135] result of the search and seizure of defendant's room on December 18, 1935.

V.

"Error of the trial court made on the hearing of said motion to suppress evidence obtained by said search and seizure, in denying defendant's offer of proof that the Federal and Police Officers making said search and seizure could reasonably have obtained, and had reasonable grounds for obtaining, a search warrant for said search and seizure, which offer of proof was denied by the court over the exception of defendants.

VI.

"That the trial court erred in denying the motion of the defendant, Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of a purported confession obtained from her by Federal Narcotic officers during the night of December 19, 1935.

VII.

"That the trial court erred on the hearing of said motion to suppress said confession in denying defendant's motion to produce said confession for inspection and for use in connection with the examination of the witnesses called to testify with relation to said confession.

VIII.

"That the trial court erred in admitting in evidence U. S. Exhibits A and B, being the purported confessions of the defendants herein.

IX.

"That the trial court erred in refusing to instruct the jury, upon motion duly made by defendants, that the purported confession of Robert Chang, alias Yuk Moon, could not be considered as evidence against Mrs. Ah Fook Chang, alias Kam Yuen.

X.

"That the trial court erred in refusing to instruct the jury, upon motion duly made by defendants, that the purported confession of Mrs. Ah Fook Chang, alias Kam Yuen, could

not be considered as evidence against Robert Chang, alias Yuk Moon.

XI.

"That the trial court erred in admitting in evidence as exhibits the opium, suitcase, boxes and papers and other articles obtained as a result [136] of the search and seizure of defendant's (Robert Chang's) room in the Mauna Kea Rooming House on said 18th day of December, 1935.

XII.

"That the trial court erred in refusing to admit in evidence, upon the trial of the above entitled cause, the sworn testimony of defendants given in support of the motion of Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of her purported confession.

XIII.

"That the verdict of the jury herein was contrary to the evidence, to the law and to the weight of the evidence.

"This motion is based upon the records and proceedings had herein.

"Dated at Honolulu, this 20th day of February, A. D. 1936.

"MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON—Defendants above named,

By (sgd) E. J. BOTTS,
Their Attorney."

Said motion, being submitted to the Court, was denied, to which ruling counsel for defendants then and there excepted.

Forasmuch as the matters above set forth do not fully appear as of record, defendants tender this, their Bill of Exceptions, and pray that the same may be signed and approved by the judge of this Court.

Dated at Honolulu, this 3rd day of March, A. D. 1936.

(sgd) E. J. BOTTS,
Attorney for Defendants. [137]

The foregoing Bill of Exceptions was filed on the 18th day of March, A. D. 1936, within the time allowed for filing the Bill of Exceptions. Said Bill contains all the material evidence given and proceedings had upon the trial of this action and the Court's charge to the jury, and is in all respects correct, and is hereby approved, allowed and settled and made a part of the record herein.

Dated. Honolulu, T. H., March 18th, A. D. 1936.

(s) S. C. HUBER
Judge, United States District Court, in and for the District and Territory of Hawaii.

Service of a copy of the above Bill of Exceptions acknowledged, this 3rd day of March, A. D. 1936.

(s) WILLSON C. MOORE
Ass't United States District Attorney, in and for the District and Territory of of Hawaii. [138]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

Filed Mar. 18, 1936 at 1 o'clock and 10 minutes p. m. Wm. F. Thompson, Jr., Clerk. By (s) Thos. P. Cummins, Deputy Clerk. [139]

To the Clerk of the Above-Entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Indictment.
2. Bill of Exceptions.
3. Verdict.
4. Judgment and sentence.
5. Clerk's Minutes.
6. Petition for appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Citation on Appeal (original).
10. Bond on Appeal.

11. Exhibits (except such exhibits as may be omitted by stipulation of parties).

12. Clerk's Certificate.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit and filed in the office of the Clerk of said Court of Appeals at San Francisco, in the State of California, before the 6th day of April, 1936.

Dated at Honolulu, this 18th day of March, A. D. 1936.

MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON—Defendants.

By (s) E. J. BOTTS

Their Attorney. [140]

Received a copy of the within Praecipe on this 18th day of March, A. D. 1936.

(s) WILLSON C. MOORE

Assistant U. S. District Attorney [141]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Territory of Hawaii—ss:

I, WM. F. THOMPSON, JR., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages numbered from 1 to 141 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and I further certify that I am attaching hereto the original citation on appeal and that the cost of the foregoing transcript of record is $53.50 and that said amount has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said court this 22nd day of September, A. D. 1936.

[Seal] WM. F. THOMPSON, JR.,
Clerk, United States District Court, Territory of Hawaii. [142]

[Endorsed]: No. 8352. United States Circuit Court of Appeals for the Ninth Circuit. Mrs. Ah Fook Chang, alias Kam Yuen and Robert Chang, alias Yuk Moon, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed October 9, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8352

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Appeal From the United States District Court for the Territory of Hawaii.

FILED
JAN - 9 1937
PAUL P. O'BRIEN,
CLERK

E. J. BOTTS,
Stangenwald Building,
Honolulu, T. H.,
Attorney for Appellants.

Parker Printing Company, 545 Sansome Street, San Francisco

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No. 8352

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias KAM YUEN and ROBERT CHANG, alias YUK MOON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS

On Appeal From the United States District Court for the Territory of Hawaii.

I.

STATEMENT OF THE CASE.

Mrs. Ah Fook Chang and her son, Robert Chang, were indicted by the Grand Jury on January 17, 1936, on a charge of violating the Act of February 9, 1909, as amended (The Narcotics Drugs, Import and Export Act) and the Act of December 17, 1914, as amended (The Harrison Narcotic Act) (R. p. 4). They were

thereafter tried in the United States District Court and convicted (R. pp. 7-8) from which conviction they appeal (R. p. 40).

Defendants reside on the island of Maui (R. pp. 10; 15). On January 20th, they were arraigned (R. p. 24) and thereafter and prior to plea (R. p. 25) Robert Chang filed a motion to suppress the evidence, i. e., smoking opium, obtained in the search of his room on December 18, 1935 (R. pp. 45-46). The motion charged that officers of the United States and Peace Officers of the County of Hawaii had searched his private room without a search warrant or other legal authority (R. pp. 46-47). Issue was joined on this motion; the search was admitted but the familiar claim was made that it was a permissive search (R. pp. 48-49). Robert Chang testified in support of the motion that he was twenty-four years old, born on the island of Maui and had had three years of schooling; that he had spent years of his youth in China and returned here at the age of eighteen and entered school, third grade (R. p. 51). He testified that he arrived in Hilo December 18, 1935, at about 7 o'clock A. M., and on his arrival there immediately went to the Maunakea Rooming House in that town and engaged a room for himself. He left a suitcase in his room and walked around the town (R. p. 52). When it was getting dark, about 7 o'clock in the evening, he was crossing the street, walking away from the rooming house (R. p. 52), when three officers called to him:

"A. * * * and they yelled out to me and asked me 'Come here, boy', and they said they wanted to search my room.

Q. Did they tell you they were officers?

A. Yes sir, they said they were officers, and they shove me by the steps, they said they want to search my room, and I walk up; they tell me walk up first, and I went up to the room, and they told me, 'What room you stay?'; I said, 'Ten'; they said, 'Open the door'; and I scared, and I open the door; they ask me 'Open the suitcase', and I open the suitcase.

* * * * * * *

Q. And did you open the suitcase?

A. Yes sir; I was scared, I open the suitcase and they say I am under arrest." (R. p. 53)

The suitcase contained tins of smoking opium.

"Q. Why was it that you let them in your room like that?

A. They shove me to the steps and they say they are police officers.

Q. And you felt you had to do that?

A. Yes sir." (R. p. 54)

The government did not deny that Robert Chang's room was searched without a warrant, but claimed it was permissive. Lee A. Pearson, a Federal Investigator at Hilo, who participated in the search, testified that he, in company with Hilo police officers, stopped Robert Chang and told him they wanted to see him and, after one officer displayed his badge, said they wanted to search his room; that the defendant had said "O.K., come on up", and permitted them to enter and search his room (R. p. 62).

On cross examination, the defendant wished to show that the police and federal investigators had been working on the case since 5 o'clock in the afternoon; that they had shadowed Robert Chang and his mother about Hilo and that at 7 o'clock, when the officers thought the moment auspicious, *they approached Robert Chang and demanded of him permission to search his room* (R. p. 65). But the court refused to permit this proof. The record on this point speaks for itself.

> "Q. As I understand, the facts are these; that about 5 o'clock in the evening of the day in question you and Pacheco and Takemoto of the Hilo Police began an investigation of this matter?
>
> Mr. Moore: I object, may it please the court, to any investigation; we're talking about this search——
>
> Mr. Botts: This investigation would show, Your Honor, what they did; that's what it's intended to bring out.
>
> Mr. Moore: We're showing what's just before and during the search, Your Honor; we're not on a fishing expedition.
>
> Mr. Botts: There's no fishing expedition, by any manner, shape or means.
>
> The Court: We can't try the main case now.
>
> Mr. Botts: I'm not attempting to; it's just the search and the immediate steps leading up to the search.
>
> The Court: Your witness has testified, and so has this witness, that at 7 o'clock they went to this place.
>
> Mr. Botts: Yes. Now we're going to show that they began their details on this case at 5 o'clock and followed the last witness Robert

Chang and his mother to different places in Hilo, and it ultimately culminated in their apprehending Chang and gaining entrance to his room.

The Court: But, assuming they had followed him from the time he left there at 7 o'clock in the morning, as he testified he did, how would that throw any light on the facts surrounding this immediate search?

Mr. Botts: It's very material, if Your Honor please——

The Court: The Court doesn't see it.

Mr. Botts: If these investigators were investigating, as I am prepared to show they were in this case, there were certain things that properly should have been done. Now we offer to prove by this witness that he, with the officers I have named, Antone Pacheco and Takemoto, at 5 o'clock on the evening in question were detailed to this case; they saw Robert Chang's mother and Robert Chang himself coming out of the Hawaii Meat Market on Kamehameha Avenue and get on a bus and go down to Kress store on Kamehameha Avenue—that's about 1,000 feet from where they got on; these officers followed Mrs. Chang and her son in another machine; he will testify that as they approached the Kress store Mrs. Chang, with a baby in her arms, and Robert got off the machine and walked toward the Hilo Electric building, and these officers followed them. They shadowed their movements, in other words, from 5 o'clock to 7 o'clock and then, at the moment they thought auspicious, *approached Robert Chang and demanded of him permission to search his room.*

Mr. Moore: We object, may it please the court; it's nothing to do with the request for permission to search the room.

The Court: Yes, the Court doesn't see the materiality of what happened prior to the time they contacted this defendant.

Mr. Botts: Will Your Honor consider that as an offer or proof?

The Court: It may so be considered.

Mr. Botts: And will Your Honor rule on it?

The Court: Yes. The offer is not admitted." (R. pp. 63-65)

Again, when the government called its second witness, K. Takemoto, a Hilo police officer who took part in the search, (R. p. 66), the defendant with renewed insistence demanded the right to show the circumstances leading up to this search to throw light on, first, the question of its voluntary character, and second, that under the circumstances, it was the duty of the officers to have obtained a search warrant. Again, it will be necessary to quote from the record with Officer Takemoto on the stand.

"Q. What was the first time, during the day that you saw either Robert Chang or his mother?

Mr. Moore: I object to this, may it please the Court, as this is an attempt on behalf of counsel to get what the offer of proof just made that was denied. We're talking about 7 o'clock here.

Mr. Botts: We have a right to go into the antecedents of this search.

The Court: You are, if it pertains to the search; but if it's a fishing expedition on your main case you're not.

Mr. Botts: We're not concerned with the main case; we're concerned here, Your Honor, with whether they had reasonable cause to apply for a search warrant. I expect to show by this witness that they had this boy under serveillance for two hours, and I offer to show that.

Mr. Moore: Then, may it please the Court, it is not proper for counsel to show or make out a case on cross-examination. I have no objection to him cross-examining this man to his heart's content about this search, but to go in and say he makes an offer of proof to show this, that and the other—let him put him on as his witness, and not on cross-examination.

Mr. Botts: We're not, Your Honor. They don't ordinarily stop a man on the street and say 'We want to search your room' unless there's some cause for it. Now, he says they apparently stopped this man in the lawful exercise of his right crossing the street at 7 o'clock in the evening. I submit to Your Honor that under the circumstances revealed by this direct examination we have an absolute right to inquire into the history of this situation, the matters that led up to the stopping of this man on the street; and I except to Your Honor's ruling.

Mr. Moore: May it please the Court, this man has brought a motion to suppress the evidence here, and he has set forth, so far as this witness is concerned, for which offer he closed his case, that this boy was intimidated or forced against

his will to open this door, and we're rebutting that by our answer here and putting on proof. To go around in circles here on something he says he's going to prove, that if he was going to prove anything like that the time for him to prove it is on his case in chief and call his witnesses for it. To come in here and attempt to drag in on cross-examination things that have nothing to do with this particular search, under a guise of cross-examination, we submit is absolutely improper and we object to it.

The Court: It seems to the Court that the issue in this motion is narrowed to very definite limits. The petition itself sets out that the search was unlawful in that this man's private room was invaded without a search warrant or lawful authority. In answer the Government sets up that the search was made with the consent of the defendant—consent voluntarily given; and that is traversed by the traverse filed by the defendant, which alleges, as the Court now recalls it, that the search was not acquiesced in by him, but virtually that he was coerced into permitting the search; in other words, that he was compelled by the officers to submit to this search. Any evidence bearing upon that question will be gladly received.

Mr. Moore: To which we have no objections whatsoever.

Mr. Botts: We offer to prove, if Your Honor pleases, by this witness that, on or about 5 o'clock in the afternoon of the day in question, this witness and his associates, the officers had information that reasonably led them to believe that this defendant Robert Chang had opium in his pos-

session secreted in the room in the Maunakea boarding house; that they were acting upon this information which reasonably tended to establish that as a matter of law, and that they followed these defendants for two hours, from 5 o'clock in the afternoon until 7 o'clock, when they finally stopped Robert Chang. And what happened after that has been related in the evidence.

Mr. Moore: We object to the offer as being incompetent, irrelevant and immaterial, and as having no bearing upon the issues of this case, on the matter now before the Court.

The Court: In view of the Court, an officer might keep a suspected person under surveillance on mere suspicion but he could not possibly apply for a search warrant on that suspicion.

Mr. Botts: I wasn't dealing with suspicion, Your Honor; I was dealing with reasonable cause to believe, as a legal proposition, that these people had opium—that this man had opium: not mere suspicion, they had definite facts. Will Your Honor rule on the offer?

The Court: *Yes. The evidence will not be admitted.*

(Exception No. 2). To which said ruling of the Court, the defendant duly excepted and his exception was duly allowed." (R. pp. 67-71)

The motion to suppress was denied (R. p. 26).

Before the trial the defendant, Mrs. Ah Fook Chang, filed a motion to suppress a purported confession obtained from her on December 19th (R. p. 72). In this motion Mrs. Chang set forth that her son, Robert, was

arrested on December 18th in connection with the seizure of certain smoking opium and that she was arrested and placed in custody on the same day. Paragraph III of her motion reads as follows:

> "That the movant was taken in custody at approximately 7 o'clock P. M. of said 18th day of December, 1935, and, without warrant or process of any kind, she was held a prisoner by Federal officers and peace officers of Hilo until approximately 9 o'clock A. M. of December 20th, 1935, a period of thirty-eight hours, when she was brought before the United States Commissioner at said Hilo and charged. That movant was taken to jail with her child, an infant in arms whom she is nursing. That on or about 2 o'clock P. M. on the following day, i. e., December 19th, 1935, notwithstanding that she had not been brought before the United States Commissioner or other magistrate to be charged, she, with her infant child, was conducted into a room or office and there subjected to a tortuous examination by Federal officers and peace officers of Hilo, in the course of which she was repeatedly informed that the inquisition would not cease, and she would not be permitted to rest with her baby, unless she signed a paper writing purporting to be a confession of her claimed complicity in connection with the opium seized from the said Robert Chang, alias Yuk Moon. That the interrogation continued throughout the entire afternoon and evening of said 19th day of December, 1935, when finally, at approximately midnight on said day, movant, completely exhausted by the ordeal and in great

distress and apprehension over her plight and the condition of her child, affixed her signature to said paper writing to put an end to the torture of further accusatory proceedings by said officers. That during the afternoon and evening of said 19th day of December, 1935, movant had been wholly unable to take food of any kind because of her suffering and her mental condition of worry and fear, occasioned by the conduct of said Federal and peace officers aforesaid, and in consequence thereof, she was unable to nurse her child, her breasts being without the customary milk and the child, hungry and distressed and almost constantly crying in its plea for nourishment, caused movant frantically and without thought of self, to accede to the demands of said officers and to sign the paper writing desired by them. That movant is a person of the Chinese race with only a meager education and with only an imperfect understanding of the English language.

"That movant is informed and believes and alleges the fact to be that upon her trial in the above entitled matter the government intends to offer said paper writing in evidence and movant makes this motion in advance of trial for the suppression of said paper writing on the ground that the same was obtained from her illegally and improperly and in violation of her constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States of America." (R. pp. 73-75)

The government admitted the existence of the confession and its intended use but denied that it had been taken from her involuntarily (R. pp. 76-79). Mrs. Chang took the witness stand in support of this motion (R. p. 80) and testified that she was forty-five years old, practically illiterate (R. p. 81); she is the mother of six children and lives in Wailuku, Maui (R. p. 81). She testified that she and her son, Robert, arrived in Hilo on the *S. S. Waialeale* or *S. S. Hualalai* on December 18, 1935 (R. p. 81), and at 7 o'clock that evening while she was "in one store drinking soda water with my baby", she was arrested. She said a Portuguese man came in, presumably an officer, told her "Come here"; that she was very frightened and stood up, holding her baby. Said he grabbed her hand and pulled her across the street where they met another officer and they took her to Robert Chang's room in the Maunakea Rooming House, a place she had never been before (R. p. 81). Robert Chang was there and they took them to jail, including the woman's infant. She remained in jail all night without being questioned or charged. They gave her a little pork and rice and some kind of fish the next morning but she couldn't eat very much.

> "Q. Why not?
> A. Because I worry about my baby, I couldn't sleep that night, ——" (R. p. 82)

She remained in jail without being charged or brought before the Commissioner or allowed bail. The welfare of her infant, in jail with her, distressed her greatly

(R. p. 83). At 2 o'clock in the afternoon, the day following her arrest, they took her from jail to the Police Station where they put her in a room, probably in the room with the desk sergeant (R. p. 83). She hadn't seen Robert Chang since his arrest or talked to him (R. p. 83). She testified that during her first night of imprisonment, she asked for use of a telephone that she might notify her family on Maui of her plight, but permission to use the phone was denied her (R. p. 83). She remained at the Police Station, uncharged and uninterrogated, until about 7 o'clock in the evening, twenty-four hours after her arrest. She said they offered to take her back to the "calaboose house" for dinner, but she didn't want to eat "because I am worry my baby". Finally they took her in the next room where there were four or five policemen and they questioned her (R. p. 84). She said she didn't know which officer questioned her. She said:

> "A. I don't know which one ask me, I cannot remember which one ask me, because this one ask me, and this one ask me,—I don't know.
>
> Q. They were all asking you questions?
>
> A. Yes; they didn't give me chance; I was so worried about my baby, I was so worried about my baby.
>
> Q. Four or five of them kept asking questions?
>
> A. Yes." (R. p. 85)

The questions concerned her knowledge of the opium which had been found and seized in Robert Chang's room in the Maunakea Rooming House. She said she

denied she knew anything about this opium for a long time and they continued questioning her in a loud voice.

> "Q. What did they say to you?
> A. They ask me if I know this, and I said I don't know; they said, 'You know, you have to tell, otherwise you stay in jail'; and I said, 'I want to telephone'; they said, 'No, no, you have to tell everything, then you can go outside, otherwise we won't let you telephone, we won't let you go to sleep.'" (R. p. 85)

> "Q. Did they say anything about your boy?
> A. They said if I tell then easy for my boy and easy for me to go out; and I ask them if I can go up that night sleep with my baby some place; they said, 'Sure, if you tell I let you go telephone'; I said, 'I want to telephone to my husband, nobody knows where I am, you see'." (R. p. 86)

So at last, with assurance that she could telephone her husband if she signed the paper, sometime between eleven o'clock and midnight, between twenty-eight or twenty-nine hours after she was put in jail with her infant, she signed a confession. She said, finally being asked if she did sign the confession:

> "A. Yes, because I worry I cannot get out with my baby; I didn't eat no food that evening and my baby get no more milk to drink, I worried about my baby; he said, 'We let you go out if you sign the paper, it's easier for you'." (R. pp. 86-87)

But though she signed the paper she was not charged nor given an opportunity to make bail but was taken back to jail where she and the baby spent another night. Finally, the next morning, she was taken to the United States Commissioner (R. p. 125) and charged. She knew her son had signed a paper but she did not know what it contained (R. p. 87). Referring to her paper, she said she wouldn't have signed it had she not been worn out from lack of sleep and holding her baby in her arms all night, which was cold and rainy (R. p. 88). She said she was in a frame of mind where she would do anything.

> "Q. Finally, on the second day, when your baby was cold and sick, you signed the paper?
>
> A. Yes, for my baby's sake I do anything, because my baby never have enough breast that Wednesday night and Thursday." (R. p. 88).

The woman's testimony and many of its details were corroborated by her son, Robert Chang (R. pp. 95-98).

The government opposed the motion and called to the witness stand officers who had part in obtaining the woman's confession (R. pp. 99-116). In the course of this phase of the hearing it became important to cross-examine these witnesses with some detail. Several statements had been taken from the woman defendant (R. p. 15) in only the last one of which did she admit complicity in the opium transaction (R. p. 116). Counsel for defendant called for the production of the purported confession to aid in the cross-examination of the witnesses and in this regard the following proceedings were had:

"Q. Mr. Wells, have you that statement that she signed?

Mr. Moore: I have that statement in my file.

Mr. Botts: I ask counsel to produce it, Your Honor.

Mr. Moore: I feel, Your Honor, that I'm not called upon to produce it.

The Court: The Court is not concerned with what's in the statement, but how it was obtained.

Mr. Botts: We submit that upon proceedings pertaining to a confession we're entitled to have the instrument itself produced in court for inspection not only for the court but for the defendant himself and his counsel.

The Court: That would be true when the statement is offered, but not prior to that. This is not a fishing expedition.

Mr. Botts: It's not a case of a fishing expedition.

The Court: Well, it looks very much like it when you ask to see the statement.

Mr. Botts: There's a specific statement alleged to have been taken from this witness, and we submit at this time on proceedings in advance of trial we're entitled to the production of that statement in court.

The Court: The Court's view of that differs from that diametrically.

Mr. Botts: Your Honor refuses to compel the production?

The Court: Yes, that's the effect of the ruling.

Mr. Botts: Exception.

The Court: Let the exception be noted." (R. pp. 113-114)

The government denied the confessions were obtained by threats or promises, but did not deny that defendants had been kept in jail for thirty-eight hours without charge, though a United States Commissioner maintained an office in the Police Department and that his office was only "about four long blocks from where she was arrested" (R. pp. 102-103).

The motion to suppress the confession was denied over defendant's exception (R. p. 117).

Thereafter a jury was empaneled and defendants put to trial jointly. When evidence was offered relating to the search and seizure in the Maunakea Rooming House, defendant renewed his objection to this evidence on the ground that the search and seizure were illegal, the objection was overruled and it was understood that all such testimony would be admitted subject to defendant's objection and exception (R. pp. 118-119).

On the trial it developed that the police officers first saw Robert Chang at 5 o'clock in the afternoon of December 18th on Kamehameha Avenue. The officers shadowed him under direction of George Richardson, Inspector of Police of South Hilo. Mr. Richardson informed the officers that defendant, Robert Chang, had opium in his room in the Maunakea Rooming House and after following him for about two hours, they took a position near the rooming house where they could contact him when he came out (R. pp. 120-121). When he was crossing the street, the officers approached him and told him that they were police officers and they wanted to search his room and he

said "O.K." (R. p. 118). The officers accompanied him to his room where they found the opium in a suitcase (R. p. 119). Officer Pacheco, after finding the opium, left the rooming house and "picked up" Mrs. Ah Fook Chang (R. p. 134) and took her to room 10 in the Maunakea Rooming House. Remaining there a few minutes, the officers took the woman and her son to the Hilo Police Station where the two defendants were booked (R. p. 134). The defendants were kept in jail without questioning or charge until the afternoon of the next day when William K. Wells, narcotic agent, arrived from Honolulu (R. p. 136). He proceeded to question the defendants, first the boy and then the woman and this continued until around midnight that night, by which time the confessions had been obtained from both defendants. [Robert Chang's confession (R. pp. 9-13); Mrs. Ah Fook Chang's confession (R. pp. 148-151).] These confessions were admitted in evidence over defendants' objection and exception, the objection being that they were obtained while under illegal restraint and were not free and voluntary.

Following the admission of these statements, counsel for defendants asked the court to instruct the jury, in effect, that the confession of one defendant could not be considered as evidence against the other. We quote from the record:

> "The statement having been admitted in evidence, the following proceedings were had:
>
> Mr. Botts: I now ask Your Honor to instruct the jury that any statements made in this statement Exhibit 'B' in which Robert Chang's name

appears in an incriminating way, that the jury be instructed that it is not evidence in any manner, shape, or form against Robert Chang and can only be considered as against Mrs. Ah Fook Chang, and that the weight of this statement, that is, what value if any the jury wants to place upon it, is solely within the purview of the exclusive power of the jury.

Mr. Moore: *We have no objections to the jury being so instructed, for the reason that with this particular statement there is no evidence that Robert Chang was asked whether or not this statement was correct.* It appears with reference to the other statement that after it was completed and read to the defendant Robert Chang, the defendant Mrs. Ah Fook Chang was asked whether or not that statement, which is United States Exhibit 'A', was correct, and she stated that it was to that as to this particular statement we have no objections to the jury being instructed that, insofar as the defendant Robert Chang is concerned, it cannot be considered as against him.

The Court: Before ruling on this matter I'd like to ask the witness a question.

Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?

A. Yes sir.

Q. He heard the statement read to her?

A. He was sitting in the room on my right; Mrs. Ah Fook Chang was on the left of the table.

The Court: It appearing that this statement was made in the presence of the defendant Robert Chang, the instruction will not be given.

Mr. Botts: Exception, if Your Honor pleases.

The Court: Exception noted." (R. pp. 151-153)

At other times during the trial, as will be shown, counsel for defendants made renewed efforts to restrict the confession as evidence to the party making it but without success (R. p. 182). Following the admission in evidence of these confessions, the prosecution put in evidence, over the objection and exception of defendants, the opium and other articles seized in room 10 of the Maunakea Rooming House. When these articles were admitted, counsel for defendants asked that the sworn testimony of Mrs. Ah Fook Chang and Robert Chang, given in court in connection with the hearing on the motion to suppress, be read to the jury by the court reporter, but this motion was denied over defendants' exception (R. pp. 158-162).

The court refused to give nine instructions requested by defendants (R. pp. 174-181). These instructions all centered around the confessions obtained from the defendants and they will be discussed with some detail in the latter part of this brief.

The jury retired and after some hours and while counsel for the prosecution and defendants were chatting with the trial judge in his chambers, the foreman of the jury unexpectedly appeared, entering the chambers through a side door usually used by the judge in going to and from the courtroom. The proceeding which followed occurred in the chambers of the judge with only the foreman, counsel and the judge present. The foreman stated the jury wished to be informed if a confession of one defendant in the case could be used as evidence against the other. Counsel urged the court to instruct the jury in the negative,

that is, that a confession of one defendant could not be used as evidence against the other, but the court refused to do this and adhered to its original ruling and instructed the foreman that a confession made by one defendant in this case could be considered as evidence against the other (R. p. 182). The foreman retired and shortly thereafter a verdict was returned against both defendants (R. pp. 7-8).

II.

SPECIFICATIONS OF ERRORS RELIED ON.

The assignment of errors (R. pp. 34-40) contains twenty-one specifications of errors but for the purposes of this brief it will only be necessary to discuss eighteen of them.

ASSIGNMENT No. 1.

> That the Court erred in overruling and denying the motion of Robert Chang, alias Yuk Moon, one of the defendants herein, to suppress the evidence obtained as a result of the search and seizure on December 18, 1935, when Hilo Police Officers accompanied by a Federal Officer entered his room in the Maunakea Rooming House and searched the same under the pretended authority of his consent to such search, no such consent, as a matter of law, having been given or received.

ASSIGNMENT No. 2.

> That upon a hearing of the motion to suppress the evidence obtained as a result of the search and seizure referred to in the preceding assign-

ment, the defendant offered to prove that the officers searching said room had reasonable grounds to obtain and could reasonably have obtained a search warrant to authorize the said search and the Court erred in refusing said offer and denying defendant an opportunity to make said proof.

In this connection, defendant offered to prove (R. p. 70) that the officers had watched defendant for about two hours; that they had definite facts upon which they could reasonably have obtained a search warrant but instead they approached defendant and demanded permission to search his room (R. p. 65).

ASSIGNMENT No. 3.

That the defendant, Mrs. Ah Fook Chang alias Kam Yuen, petitioned the Court for the suppression, or exclusion, from evidence of a purported confession claimed to have been obtained from her by Federal Narcotic Officers and Police Officers of the City of Hilo on December 19, 1935, illegally and improperly and in violation of her constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States, and the hearing on said petition having been duly held, the Court erred in denying the same and holding and deciding that said confession was a free and voluntary act of the said Mrs. Ah Fook Chang alias Kam Yuen.

ASSIGNMENT No. 4.

That in the course of the hearing on said motion to suppress said confession and while William K. Wells, Federal Narcotic Agent, was on the wit-

ness stand, he being the Federal Officer who had taken said confession, the said defendant, Mrs. Ah Fook Chang alias Kam Yuen, moved the Court to require the production of said confession for the purpose of inspection and for use in the further examination of the said witness and the Court erred in denying said confession at said time and for said purpose and in denying said defendant the right to examine the same.

ASSIGNMENT No. 5.

That on the trial of the above entitled cause, the Court erred in permitting, over the objection and exception of defendants, the introduction in evidence of the property and articles found and seized in connection with the search of the room premises of defendant, Robert Chang alias Yuk Moon, on the said 18th day of December, 1935.

ASSIGNMENT No. 6.

That the Court erred in admitting in evidence over the objection and exception of the defendants, the purported confession of Robert Chang admitted in evidence as U. S. Exhibit "A" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of his mind and memory while in unlawful confinement and by coercion.

ASSIGNMENT No. 7.

That the Court erred in denying the request of Mrs. Ah Fook Chang alias Kam Yuen that the Court instruct the jury that the statement or con-

fession of the said Robert Chang alias Yuk Moon (U. S. Exhibit "A") could only properly be considered as evidence against him and not as against her.

Assignment No. 8.

That the Court erred in admitting in evidence, over the objection and exception of the defendants, the purported confession of Mrs. Ah Fook Chang alias Kam Yuen admitted in evidence as U. S. Exhibit "B" on the ground that said purported confession was taken while said defendant was under illegal restraint and that the same was not a free and voluntary confession and was obtained as a result of an illegal search and seizure of her mind and memory and while in unlawful confinement and by coercion.

Assignment No. 9.

That the Court erred in denying the request of Robert Chang alias Yuk Moon that the Court instruct the jury that the statement or confession of the said Mrs. Ah Fook Chang alias Kam Yuen (U. S. Exhibit "B") could only properly be considered as evidence against her and not as against him.

Assignment No. 10.

That the plaintiff having rested, defendants offered in evidence the sworn testimony of the defendants given in connection with the motion presented by Mrs. Ah Fook Chang alias Kam Yuen to suppress the statement or confession

purported to have been made by her and the Court erred in denying said offer and refusing to allow the evidence to be read to or considered by the jury.

The proceedings with respect to this offer were substantially as follows:

The case for the prosecution was closed; the Court had admitted the confessions of the two defendants in evidence. A day or two before the trial, a hearing had been held before the judge on the motion to suppress Mrs. Ah Fook Chang's confession, in which hearing both defendants testified and were cross-examined by counsel for the government. Defendants moved that this sworn testimony be read by the court reporter to the jury (R. p. 158), which motion was denied.

Assignment No. 11.

That the Court erred in giving the Court's charge or instruction (No. 12-a) in that said instruction failed to define the meaning of the word "voluntary", as used in connection with the phrase "free and voluntary confession". Said instruction No. 12-a is as follows:

> You are instructed that there has been admitted in evidence in this case alleged confessions of each defendant, and that each of these confessions were alleged to have been made in the presence of each of the defendants.
>
> The Court instructs you that a confession of guilt should not be considered if it was not free

and voluntary but procured through influence or threats or the promise of favor, or other circumstances which might render it involuntary. But a free and voluntary confession is generally deserving of the highest credit because it is against the interest of the person making it and is presumed to flow from a sense of guilt.

You are further instructed that a confession of this character should be received with caution and defendants should not be convicted upon the evidence of such confessions alone, unless supported by other proof in the case.

ASSIGNMENT No. 12.

That the Court erred in refusing to give defendants' requested instruction number one as follows:

I instruct you, Gentlemen of the Jury, that there has been admitted in evidence what purports to be written confessions by the defendants herein.

In this connection, I instruct you that a confession, to be considered as evidence against a defendant in a criminal case, must be one freely and voluntarily made by such defendant. When we use the word "voluntary" in this connection, we mean that the confession must have been made of defendant's free will and accord, without coercion, promise or inducement or by the method known as sweating. The word "voluntary" essentially includes in its meaning the freedom of choice as well as the exercise of the defendant's will without constraint by any force or influence. If, in this case, you believe from the evidence and

the facts surrounding the incarceration of these defendants that either of the two purported confessions admitted in evidence herein was not voluntarily made, within the meaning of that word as defined in this instruction, or if you have a reasonable doubt on the point, you should totally disregard, in your deliberations, such confession.

ASSIGNMENT No. 13.

That the Court erred in refusing to give defendants' requested instruction number two, as follows:

> I instruct you, Gentlemen of the Jury, that in considering whether or not the confession made by Mrs. Ah Fook Chang was voluntarily made within the meaning of this term as heretofore defined in these instructions, it is your right and duty to take into consideration the period, circumstances and duration of her arrest, confinement and detention and the fact that she had, previously to the making of said confession, made at least two other statements in which she denied all guilt and complicity in the matters and things set forth in the final purported confession which was obtained from her, as well as all other facts and circumstances surrounding the taking and making of said alleged confession.

ASSIGNMENT No. 16.

That the Court erred in refusing to give defendants' requested instruction number six, as follows:

> The Court instructs the jury that it was the duty of the officers who arrested defendants in this case, to have brought them before the United

States Commissioner at Hilo, or local magistrate without unnecessary delay, that they might speedily be advised of the accusation against them and be permitted enlargement on bail.

I further instruct you, as a matter of law, that failure on the part of an arresting officer to bring an arrested person with reasonable dispatch before a commissioner or magistrate, for the purposes mentioned in this instruction, renders the detention and imprisonment of the arrested person unlawful.

ASSIGNMENT No. 17.

That the Court erred in refusing to give defendants' requested instruction number seven, as follows:

I further instruct you, Gentlemen of the Jury, that an arresting officer has no legal right to hold an accused in jail without charge, for the purposes of investigating the crime he is believed to have had a part in, or to procure a confession from him. Detention for such purpose or purposes is illegal.

ASSIGNMENT No. 18.

That the Court erred in refusing to give defendants' requested instruction number eight, as follows:

I further instruct you, Gentlemen of the Jury, that if you believe from the evidence that the defendants in this case were held in confinement without charge and without opportunity to make bail, for an unreasonable length of time, considering the availability of a United States Com-

missioner, then I instruct you as a matter of law their detention and imprisonment was improper and illegal.

ASSIGNMENT No. 20.

That the Court erred in refusing to give defendants' requested instruction number ten, as follows:

> And I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders a confession thus obtained invalid and inadmissible againt him. A confession thus obtained is an invasion of defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution. These Amendments shield and protect him, not only in the lawful enjoyment of his tangible possessions, but also in the possession of the secrets of his mind.

ASSIGNMENT No. 21.

That the Court erred in denying defendants' motion for a new trial on the grounds set forth in said motion, particularly with reference to Paragraphs IV to XII inclusive, being as follows:

IV.

> Error of the trial court in denying the motion of defendant, Robert Chang, alias Yuk Moon, for the suppression of the evidence obtained as a result of the search and seizure of defendant's room on December 18, 1935.

V.

Error of the trial court made on the hearing of said motion to suppress evidence obtained by said search and seizure, in denying defendant's offer of proof that the Federal and Police Officers making said search and seizure could reasonably have obtained, and had reasonable grounds for obtaining, a search warrant for said search and seizure, which offer of proof was denied by the Court over the exception of defendants.

VI.

That the trial court erred in denying the motion of the defendant, Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of a purported confession obtained from her by Federal Narcotic officers during the night of December 19, 1935.

VII.

That the trial court erred on the hearing of said motion to suppress said confession in denying defendant's motion to produce said confession for inspection and for use in connection with the examination of the witnesses called to testify with relation to said confession.

VIII.

That the trial court erred in admitting in evidence U. S. Exhibits A and B, being the purported confessions of the defendants herein.

IX.

That the trial court erred in refusing to instruct the jury, upon motion duly made by de-

fendants, that the purported confession of Robert Chang, alias Yuk Moon, could not be considered as evidence against Mrs. Ah Fook Chang, alias Kam Yuen.

X.

That the trial court erred in refusing to instruct the jury, upon motion duly made by defendants, that the purported confession of Mrs. Ah Fook Chang, alias Kam Yuen, could not be considered as evidence against Robert Chang, alias Yuk Moon.

XI.

That the trial court erred in admitting in evidence as exhibits the opium, suitcase, boxes and papers and other articles obtained as a result of the search and seizure of defendant's (Robert Chang's) room in the Mauna Kea Rooming House on said 18th day of December, 1935.

XII.

That the trial court erred in refusing to admit in evidence, upon the trial of the above entitled cause, the sworn testimony of defendants given in support of the motion of Mrs. Ah Fook Chang, alias Kam Yuen, for the suppression of her purported confession.

III.

ARGUMENT.

1. ILLEGAL SEARCH AND SEIZURE.

(a) Search made without warrant and without defendant, Robert Chang's, consent.

(b) Court erred in refusing offer of proof; that search warrant could reasonably have been obtained by the officers who demanded admission to his room to search same.

(a) It will be conceded that the search in this case was a federal search in the sense that the Fourth and Fifth Amendments and acts of Congress relating to searches and seizures are applicable. The search and seizure and arrests were participated in by federal officers (R. p. 62) and the proceedings were regarded as federal (R. pp. 128-129). *(Byers v. U. S.,* 273 U. S. 28).

The police officers testified they approached Robert Chang, displayed their badges, said they wished to search his room; he said "O. K.", opened the door of his room and permitted them to search. This act of obedience on his part, a densely ignorant boy (R. p. 156) and a stranger in a strange town, is relied upon by the Government as a voluntary waiver of his Constitutional right. Obviously, what he did was to bow in submission to a situation too strong for him to resist. At most, he merely suffered a search to be made. In no legal sense did he waive his Constitutional right. Officers very glibly testify about asking "permission" and getting "consent" to search without warrant. They reel off the formula with the

monotony of a court clerk swearing a witness. In nine cases out of ten, it is not consent they are getting but obedience or submission. And that was what they got here. Their story of getting permission, colorless and flaccid, is strikingly in contrast to the vivid picture sketched by the illiterate defendant in a few words of broken English.

> "Q. Did they tell you they were officers?
> A. Yes sir, they said they were officers, and they shove me by the steps, they said they want to search my room, and I walk up; they tell me walk up first, and I went up to the room, and they told me, 'What room you stay?' I said, 'Ten'; they said 'Open the door'; and I scared and I open the door; they ask me 'Open the suitcase', and I open the suitcase." (R. p. 53)

This, we submit, has the salty twang of truth.

Of course a defendant may waive constitutional rights, including rights under the Fourth Amendment. See *U. S. v. Patton,* 281 U. S. 276, 74 L. ed. 834, 50 Sup. Ct. 253; *Huhman v. U. S.,* (C.C.A. 8) 42 Fed(2d) 733; *Contrell v. U. S.,* (C.C.A. 5) 15 Fed(2d) 953. But the evidence must clearly show consent was really voluntary and with a desire to invite search, and not merely to avoid resistance. (*Herter v. U. S.,* (C.C.A. 9) 27 Fed.(2d) 521; *Farris et al. v. U. S.,* (C.C.A. 9) 24 Fed.(2d) 639; also *U. S. v. Lydecker,* (D.C.) 275 Fed. 976; *U. S. v. Kelih,* 272 Fed. 484; *U. S. v. Rembert,* 284 Fed. 996.)

In order for assent to a search to be construed as consent, such assent must have been given without the

inducement of coercion, duress, fraud or overreaching of any kind. In *Gould v. U. S.,* 255 U. S. 298, where papers were taken under the guise of a social call, it was said:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

See also *U. S. v. Baldocci,* 42 Fed.(2d) 567; *U. S. v. Rembert,* supra; *Farris v. U. S.,* supra; *Slusser v. U. S.,* (D. C.) 270 Fed. 818; *Amos v. U. S.,* 255 U. S. 313; *Cofer v. U. S.,* (C.C.A. 5) 37 Fed.(2d) 677; *Territory v. Ho Me,* 26 Haw. 331; *U. S. v. Kozan,* 37 Fed. (2d) 415; *U. S. v. Marra,* 40 Fed.(2d) 271; *U. S. v. Shultz,* 3 Fed. Sup. 273; *U. S. v. Lee,* (C.C.A. 2) 83 Fed.(2d) 195; *Brown v. U. S.,* (C.C.A. 3) 83 Fed.(2d) 383; *Ray v. U. S.,* (C.C.A. 5) 84 Fed.(2d) 654.

Many times it has been emphasized by the court that mere *assent* to the request of officers to search is not *consent* (*Amos v. U. S.*, supra).

In *Farris v. U. S.*, supra, this court passed upon the question of whether the federal agents had obtained consent to search dwelling of defendant. Federal agents came to defendant's premises, disclosed their identity, said they had come to look over and search the house. Defendant replied, in effect, "All right, you will find nothing here now". Considering whether or not the defendant had waived his constitutional rights, this court said:

> "* * * we are far from convinced that the consent upon which they rely was sufficient to authorize a search, which was otherwise clearly prohibited by law."

Certiorari denied: (277 U. S. 677).

(b) Error of court in refusing offer of proof.

1. *That search warrant could have been easily obtained.*
2. *That the officers* DEMANDED *admission to Robert Chang's room to search same, notwithstanding they had no warrant.*

Defendant, Robert Chang, offered to prove that the arresting officers had *demanded* that he admit them to his room for the purpose of search (R. pp. 65; 67-70), and also that the officers were in possession of sufficient facts to entitle them to a search warrant had they applied for one. The court denied these offers (R. p. 71). It is difficult to understand how such

offers could be denied, for in the first place, if the officers *demanded* admission to defendant's room, their entry was not permissive. Obedience to a demand of an officer is not acquiescence but submission; and, of course, if the officers could reasonably have obtained a search warrant, it was their duty to have done so.

> "In cases where securing a warrant is reasonably practical, it must be used."
>
> *Carroll v. U. S.,* 267 U. S. 132.

> "* * * the agent had made no effort to obtain a warrant for making a search. They had abundant opportunity to do so and to proceed in an orderly way * * * there was no probability of material change in the situation during the time necessary to secure such warrant."
>
> *Taylor v. U. S.,* 286 U. S. 1, 52 Sup. Ct. 466.

In *Agnello v. U. S.,* 269 U. S. 20, 46 Sup. Ct. 4, the court said that the search of a man's home without a search warrant was illegal and abhorrent to the law, no matter how certain the officers were that it contained incriminating evidence; and in *U S. v. Marra,* 40 Fed.(2d) 271, the court said:

> "In this case, under the facts as they were developed at the hearing before the Commissioner, the prohibition officers could readily have obtained a search warrant for these premises. This is what they should have done instead of searching without a warrant." (Citing cases.)

We submit that the court erred in denying these offers of proof.

2. THE PURPORTED CONFESSION OF MRS. AH FOOK CHANG.

The statutes require that a defendant arrested upon a criminal charge shall be brought before "the nearest United States Commissioner" for the taking of bail (*Title 18, U. S. C.,* Sec. 595). This statute means that he be forthwith taken before the Commissioner and any delay, even a slight delay, is wrongful (*Von Arx v. Shafer,* (C.C.A. 9) 241 Fed. 649).

In the hearing before the trial judge on the motion to suppress the confession of Mrs. Ah Fook Chang, it was disclosed that the United States Commissioner maintained an office within a few feet of where the woman and her boy were kept prisoners and within four blocks of where they were arrested. (R. pp. 102-103). The purpose of this evidence was to show that it would have been a simple matter to have brought defendants before the Commissioner, charged and admitted them to bail. This was not done, but on the contrary, they were held for a period of thirty-eight hours under circumstances which are best expressed in the record itself (R. pp. 80-95).

They were deliberately held in jail to wring a confession from them (R. p. 160). It is the duty of the court to consider the real purpose behind their confinement "with an eye to detect and a hand to prevent" encroachment on their constitutional rights (*Byors v. U. S.,* 273 U. S. 28, 47 Sup. Ct. 248). For police officers to say, under the facts here revealed, that no "threats or force" was used is senseless. The force of prolonged lawless imprisonment and threat of further indefinite imprisonment, not only for de-

fendants themselves but for a hapless infant, were used by these officers, whose conception of "force" or "threats" is restricted to applications of a night-stick.

There is a touch of satire in the declaration of these officers of their delicate feeling over the constitutional rights of these defendants—rights which they flaunted in a high-handed, insolent way—the right of these defendants to be promptly charged, to be allowed bail and the advice of counsel, no less than the right of protection against involuntary self-incrimination. In a small town distant from Honolulu, they were engaged in a cold-blooded undertaking to compel the defendants to confess and to that end, they trod rough-shod over the Fourth, Fifth and Fourteenth Amendments. And now, when they cannot deny defendants were illegally imprisoned, their justification for the denial of one constitutional right is found in their violation of another.

3. DEMAND FOR PRODUCTION OF CONFESSION.

In the motion which Mrs. Ah Fook Chang filed in advance of trial for the suppression of her confession, she desired to examine Narcotic Agent Wells, who took the confession, with respect to it and while the agent was on the witness stand, asked for its production, which the court refused over the exception of defendant, branding the request as a fishing expedition (R. p. 113). It is almost incredible that a court could thus lightly dispose of a matter of such vital importance to a defendant. Search has failed to reveal any similar denial in a reparted case. On the simple authority of logic and fair deal-

ing, when defendant, in good faith and in advance of trial, and in the absence of the jury, challenges the legality of a purported confession, the thing challenged should be produced in court for the inspection of counsel, no less than the court. It is comparable to a proceeding in equity to cancel an instrument intended to be relied upon in a law action on the ground of fraud or forgery. Here instantly equity would compel its production for examination, aware that if the instrument is valid and genuine, no harm could come to respondents by its production. So with a criminal case. If this confession was obtained by proper methods, no harm could come to the government by its production in court and examination by judge and counsel. It is axiomatic that confessions are received with great caution because of the ease with which they are fabricated and the difficulty of exposing their fallacy (*Shelton v. State,* 42 So. 30, 144 Ala. 106; *Haynes v. State,* 27 So. 601 (Miss.)). This being so, the utmost liberality and scope should be allowed defendant in testing the genuineness of a confession, in advance of trial. The action of the judge in denying the request, with the slighting reference to it as a fishing expedition, came as an unexpected shock to defendants and a rebuff to their earnest effort to show the confession was obtained by methods condemned by law.

The discussion of the long and illegal detention of Mrs. Ah Fook Chang and her son without charge and opportunity to obtain bail and solely for the purpose of getting a confession, would not be complete without mention of the *Charles Hee Case* (*Charley Hee v.*

U. S., (C.C.A. 1) 19 Fed.(2d) 335). This is the case of a Chinese, resident of Boston, who claimed to be a citizen. He was arrested without warrant and imprisoned from Saturday until Monday while officers obtained a confession from him as basis for deportation proceedings. By a divided court, the First Circuit upheld the proceeding, but Judge Anderson, in a powerful dissenting opinion, branded the arrest, detention and interrogation of defendant as illegal and unconstitutional. He said:

> "If this were a criminal prosecution and if this evidence extorted from appellant while under unlawful restraint and duress had been seasonably objected to, a conviction, of course, would have to be reversed. * * *
>
> *"* * * Interrogation by a government official of one unlawfully in confinement is an illegal search and seizure, which cannot be made the basis of a finding in deportation proceedings. To seize the person and search the memory of a frightened victim is a far grosser invasion of personal liberty and disregard of due process of law than in the search for and the seizure of papers, even from a home or from an office as in the Gould Case."*

Certiorari was applied for and granted (275 U. S. 516, 48 Sup. Ct. 86). Thereafter, Mr. William D. Mitchell, Solicitor General, stipulated that the decision of the lower court should be reversed (276 U. S. 638, 48 Sup. Ct. 300).

This thought, that the Fourth Amendment protects a man against unreasonable search, not only as to his

chattels but also as to the secrets of his mind, is as old as the amendment itself. Said the Supreme Court in *U. S. v. Lefkowitz,* 285 U. S. 452, tracing historically the principles behind the amendment:

> "They apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.
>
> " '* * * Any forcible and compulsory extraction of a man's own testimony, or of his private papers to be used as evidence to convict him of a crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. And this court has always construed provisions of the constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions.' "

Courts will reject evidence obtained by an unreasonable search. To retain the evidence and merely condemn the method of securing it, would in effect reduce the fourth amendment to a rule of ethics. While courts hold that even a slight delay in charging a defendant renders his detention unlawful (5 C. J. 430), we are not prepared to say that a confession incidentally obtained while briefly and technically in unlawful restraint would be inadmissible, but we do assert that unreasonable wrongful detention, in character and duration, for the sole purpose of obtaining evidence against accused in the form of a confession, is inadmissible, for such detention for

such purpose is as violative of a man's constitutional right as the entry of his home and the search of his papers without warrant.

While, of course, confessions obtained voluntarily are not within the provisions of the Fifth Amendment, they must be voluntary in fact.

In *Zaing Sun Wan,* 266 U. S. 1, 45 Sup. Ct. 1, it was said:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat. *A confession is voluntary in law if, and only if, in fact, it was voluntarily made.*"

Purpuna v. U. S., (C. C. A. 4) 262 Fed. 473: In this case, defendant was held for twenty-four waking hours and questioned until he confessed and the court held that the confession was involuntarily obtained.

In *Davis v. U. S.,* (C. C. A. 9) 32 Fed.(2d) 860, defendant denied his guilt until taken to the morgue to view the body of the victims of the murder. The confession which followed was held involuntary.

In *Perrygo v. U. S.,* 2 Fed.(2d) 181, the defendant was questioned for more than an hour. The court took the view that even an hour's detention for questioning was more than the law sanctioned when the defendant was young and inexperienced. See, also, *Lewis v. U. S.,* (C. C. A. 9) 74 Fed.(2d) 173; *Brown v. U. S.,* 13 Fed.(2d) 298; *U. S. v. Lonardo,* 67 Fed.(2d) 883; *Murphy v. U. S.,* (C. C. A. 9) 285 Fed. 801 and *Fitter v. U. S.,* 258 Fed. 567.

4. THE COURT ERRED IN NOT EXCLUDING ROBERT CHANG'S PURPORTED CONFESSION.

What has been said with reference to the purported confession of Mrs. Ah Fook Chang applies with equal force to the purported confession of Robert Chang. This confession was admitted over objection and exception of defendant, who objected on the ground that it had been obtained from defendant while he was under illegal restraint and was not voluntarily given (R. p. 139).

5. CONFESSION ONLY EVIDENCE AGAINST PARTY MAKING IT.

It is elementary that an act or confession of a co-conspirator is binding on others in the conspiracy only when done and made when the conspiracy is pending and in furtherance of its object *(Brown v. U. S.,* 150 U. S. 93; *Wiborg v. U. S.,* 163 U. S. 632; *Clune v. U. S.,* 159 U. S. 590).

When an arrest terminates the consipracy, thereafter a confession made by one is no longer binding on his co-conspirators *(Graham v. U. S.,* (C. C. A. 8) 15 Fed.(2d) 740; *Minner v. U. S.,* (C. C. A. 10) 57 Fed.(2d) 506).

Under the amendments to the Constitution against compulsory self-incrimination (5th Amendment), a defendant, when arrested, has the right to hold his tongue. His silence under such circumstances is not an admission as it might be construed under some circumstances in a civil case *(Bilokumsky v. Todd,* 263

U. S. 149, 40 Sup. Ct. 54). The Constitution gives him the right to remain silent and he cannot be denied this right by merely availing himself of it. A person under arrest may stand his ground and hold his peace and his silence does not constitute evidence against him (*McCarthy v. U. S.*, (C. C. A. 6) 25 Fed.(2d) 298; see, also, *Rocchia v. U. S.*, 78 Fed.(2d) 966 at 972).

In this case the record does not disclose that Robert Chang even knew that Mrs. Ah Fook Chang had made a confession, or if so, what it contained (R. pp. 151-153) (*Yep v. U. S.*, (C. C. A. 10) 83 Fed.(2d) 41).

As we have shown, the court persisted in instructing the jury, over objection and exception of defendants, that the confession of one defendant could be considered as evidence against the other (R. pp. 151-152; 181-182). The court's refusal to limit the evidentiary effect of these confessions was clear error.

6. THE COURT ERRED IN DENYING MOTION OF DEFENDANTS THAT EVIDENCE OF MRS. CHANG GIVEN ON HEARING OF MOTION TO SUPPRESS BE READ TO THE JURY ON QUESTION OF VOLUNTARINESS OF CONFESSION.

In moving, as Mrs. Chang did, in advance of trial to suppress her confession, the effect of the court's ruling in admitting the confession was no more than to hold that it was prima facie admissible and, notwithstanding its admission, the jury was still free to give it such weight as it believed it was entitled to, considering all the evidence in the case, or reject it entirely.

> "When there is a conflict of evidence as to whether a confession is, or is not, voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant."
>
> *Wilson v. U. S.,* 162 U. S. 613.

See, also,

> *Peterson v. U. S.,* (C. C. A. 9) 297 Fed. 1002;
> *Gin Bok Sing,* (C. C. A. 9) 8 Fed.(2d) 976;
> *Lewis v. U. S.,* supra.

On the hearing to suppress this confession, sworn testimony had been taken from Mrs. Chang and Robert Chang (R. pp. 82-95) and the defendants offered in evidence this testimony for consideration of the jury (R. p. 158) which the court denied (R. p. 161). We respectfully submit that the court erred in denying this offer.

7. ERROR IN REFUSING DEFENDANTS' REQUESTED INSTRUCTIONS.

The court refused to give nine instructions requested by the defendants, all of which, in one way or another, concerned the confessions obtained from the defendants. It will be sufficient, for the purposes of this brief, to discuss six of these instructions separately.

The first instruction requested by defendants, as set forth in the assignment of errors, was as follows:

> "I instruct you, Gentlemen of the Jury, that there has been admitted in evidence what purports to be written confessions by the defendants herein.
>
> "In this connection, I instruct you that a confession, to be considered as evidence against a defendant in a criminal case, must be one freely and voluntarily made by such defendant. When we use the word 'voluntary' in this connection, we mean that the confession must have been made of defendant's free will and accord, without coercion, promise or inducement or by the method known as sweating. The word 'voluntary' essentially includes in its meaning the freedom of choice as well as the exercise of the defendant's will without constraint by any force or influence. If, in this case, you believe from the evidence and the facts surrounding the incarceration of these defendants that either of the purported confessions admitted in evidence herein was not voluntarily made, within the meaning of that word as defined in this instruction, or if you have a reasonable doubt on the point, you should totally disregard, in your deliberations, such confession."

This instruction correctly states the law (*Commonwealth v. McClanahan,* 155 S. W. 1131, 153 Ky. 412). Without this instruction the jury was left without "a yardstick by which they could measure the confessions" from the standpoint of their voluntary

character (R. p. 174). In *Wharton Criminal Evidence,* Vol. 2, page 1104, it is said:

> "* * * the remaining states adhere to the ruling that the question whether a confession has been voluntarily made is ultimately to be decided by the jury, where the evidence in that regard is conflicting. In all states where confessions have been admitted in evidence by the court, where there has been conflicting evidence on the question of involuntariness, *the defendant is entitled to an instruction in which the court explains to the jury the meaning of voluntariness.* * * *"

See *Davis v. U. S.,* (C. C. A. 9) 32 Fed.(2d) 860, and for cases somewhat analogous, see *People v. Sternberg,* 43 Pac. 201, 111 Cal. 11; *Roberts v. State,* 40 S. E. 297, 114 Ga. 450; *People v. Stewart,* 230 Pac. 221, 68 Cal. App. 621; *Commonwealth v. Ronello,* 96 Atl. 826, 251 Pa. 329; *Fletcher v. Commonwealth,* 275 S. W. 22, 210 Ky. 71; *State v. McDonie,* 109 S. E. 710, 89 W. Va. 185.

Instruction No. 2 requested by defendants was as follows:

> "I instruct you, Gentlemen of the Jury, that in considering whether or not the confession made by Mrs. Ah Fook Chang was voluntarily made within the meaning of this term as heretofore defined in these instructions, it is your right and duty to take into consideration the period, circumstances and duration of her arrest, confinement and detention and the fact that she had, previously to the making of said confession, made

> at least two other statements in which she denied all guilt and complicity in the matters and things set forth in the final purported confession which was obtained from her, as well as all other facts and circumstances surrounding the taking and making of said alleged confessions." (R. p. 176)

This instruction was a complement of the first and defendants were plainly entitled to it (*State v. Jordan,* 54 N. W. 63, 87 Ia. 86; *Commonwealth v. Brown,* 20 N. E. 458, 149 Mass. 35).

In *People v. Klyczek,* 138 N. E. 275, 307 Ill. 150, the court said:

> "The situation in which the plaintiff in error was placed and the circumstances surrounding him at the time were proper to be taken into consideration by the court in determining the competency of the confession, including his youth and inexperience, his character, his intelligence, his strength of intellect, his knowledge or ignorance, and the fact that he was detained in prison and was interrogated by the police who held him in custody. * * *
>
> "The question of admissibility is finally whether, considering all the circumstances of this particular case, they were such that the statement of the plaintiff in error might have been induced by their influence to make a false confession."

The defendants submitted to the court three instructions on illegal restraint and asked that at least one be given but all were refused. These instructions numbered 6, 7 and 8 (R. pp. 178-179) read as follows:

"INSTRUCTION No. 6.

"The court instructs the jury, that it was the duty of the officers who arrested defendants in this case, to have brought them before the United States Commissioner at Hilo, or local magistrate, without unnecessary delay, that they might speedily be advised of the accusation against them and be permitted enlargement on bail.

"I further instruct you, as a matter of law, that failure on the part of an arresting officer to bring an arrested person with reasonable dispatch before a commissioner or magistrate, for the purposes mentioned in this instruction, renders the detention and imprisonment of the arrested person unlawful."

"INSTRUCTION No. 7.

"I further instruct you, Gentlemen of the Jury, that an arresting officer has no legal right to hold an accused in jail without charge, for the purpose of investigating the crime he is believed to have had a part in, or to procure a confession from him. Detention for such purpose or purposes is illegal."

"INSTRUCTION No. 8.

"I further instruct you, Gentlemen of the Jury, that if you believe from the evidence that the defendants in this case were held in confinement without charge and without opportunity to make bail, for an unreasonable length of time, considering the availability of a United States Commissioner, then I instruct you as a matter of law

their detention and imprisonment was improper and illegal."

The question of illegal restraint, as we have shown, was very material in determining the voluntary character of the confessions.

In *People v. Vinci,* 129 N. E. 193 at 195, 295 Ill. 419, the court said:

> "In determining whether or not a confession was made voluntarily, it is proper to take into consideration the fact of unlawful restraint."

See, also, 16 *C. J.* 719.

There can no longer be any doubt that it was the duty of the officers making the arrest, promptly to take the defendants before the commissioner and their failure to do so made the detention illegal.

> "It is the duty of an officer after making an arrest, either with or without warrant, to take the prisoner within reasonable time, before a justice of the peace, magistrate or proper judicial officer having jurisdiction, in order that he may be examined and held, or dealt with as the case required. It is sometimes said that this must be done immediately, or forthwith, or without delay. these requirements mean no more than that it must be done promptly or within reasonable time and circumstances * * * but to detain the prisoner in custody longer than necessary *or for any purpose other than taking him before a magistrate is illegal."*
>
> 5 *C. J.* page 430.

The court was requested by defendants to give instruction No. 10, which it refused to do (R. p. 180). This instruction read as follows:

> "And I further instruct you, Gentlemen of the Jury, that the detention and imprisonment of an accused, without charge and solely for the purpose of obtaining a confession from him, renders a confession thus obtained invalid and inadmissible against him. A confession thus obtained is an invasion of defendant's rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution. These Amendments shield and protect him, not only in the lawful enjoyment of his tangible possessions, but also in the possession of the secrets of his mind."

8. ERROR IN THE COURT'S INSTRUCTION TO THE JURY FOREMAN.

It will be recalled that while the jury was deliberating, the foreman appeared unannounced and unexpectedly in the judge's chambers and there had a communication with the judge respecting the case. The only persons present besides the judge were the attorneys; the clerk and court reporter being absent, it was necessary by affidavit certified as correct by the judge to bring this phase of the case into the record (R. pp. 181-183). The foreman stated the jury wished to be advised if the confession of one defendant could be considered as evidence against the other. Counsel for defendants requested the court to answer the question in the negative but the judge, over defendants' exception, refused to do this and

reiterated the ruling he had made in the trial: that is, that a confession made by one defendant in the case could be used as evidence against the other. The foreman retired and soon thereafter a verdict was returned. No one knows what the foreman told his fellow jurors and, of course, the whole proceeding was thoroughly irregular. In practical effect, it amounted to a secret communication between the judge and one of the jurors. From any standpoint this proceeding in the judge's chambers constituted reversible error (*Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 39 Sup. Ct. 435; *Little v. U. S.*, (C. C. A. 10) 73 Fed.(2d) 861). Beside which the instruction itself is reversible error because, obviously, the confession signed by Mrs. Ah Fook Chang could not be considered against Robert Chang to whom it was never read and who, apparently, knew nothing of its contents (R. pp. 151-153).

9. DENIAL OF MOTION FOR NEW TRIAL.

All of the various errors relied on in this case by appellants were called to the trial court's attention in the motion for new trial (R. pp. 183-186), but without avail.

IV.

CONCLUSION.

The record in this case shows various reversible errors committed in the trial, leaving the appellate court with a freedom of choice, so to speak. Respectfully appellants urge the court to give primary consideration to the first assignment of error, which relates to the wrongful search and seizure of Robert Chang's room, for disposition of this point, favorable to the contention of appellants, would dispose of this case, once and for all.

Respectfully submitted,

E. J. Botts,
Attorney for Appellants.

No. 8352

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias KAM YUEN, and ROBERT CHANG, alias YUK MOON,

Appellants,

vs.

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Closing Brief on Behalf of Appellants

On Appeal from the United States District Court for the Territory of Hawaii.

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I.

SEARCH AND SEIZURE—FEDERAL UNDERTAKING.

Counsel is hardly fair with the court when he insists the search and seizure in this case was not a federal undertaking. The whole proceeding, from the beginning to the end, was a federal matter, participated in and actively aided by federal agents and officers. Counsel's own witness, Mr. Richardson, stated:

> *"That the reason that the major part of the questioning was done by Mr. Wells was because it*

> *was a federal case and the witness regarded it as a federal case from the beginning, because it involved a quantity of opium."* (R. pp. 103; 128)

Mr. Pearson, a federal Treasury agent, had participated in the arrest and took a very active part in the search and the events that happened thereafter (R. p. 122). A practice has grown up to permit trifling violations of the narcotic and liquor laws to be prosecuted in the local police or justice's court, but all substantial offenses are prosecuted in the federal court (R. p. 131).

As far as the Fourth and Fifth Amendments are concerned, it wouldn't make any difference; that is, whether it was a territorial or federal proceeding, because, as the Supreme Court of Hawaii said in *Territory v. Home,* 26 Haw. 331, in discussing a case where federal agents had made an improper seizure and turned it over to territorial officers for prosecution:

> "It would require but one step beyond the principles announced to justify a holding that evidence obtained through an unlawful search and seizure by federal officers may be retained by the City and County Attorney and introduced in evidence upon the trial of the defendant in the territorial court but having in mind the language of the Supreme Court in the Gould Case, above referred to, *and the fact that the territorial courts derive their right to exist from federal law, we are unwilling to take that step."*

In other words, the Fourth and Fifth Amendments are applicable to the official acts and conduct of territorial police officers.

But the case at bar was essentially a federal case from beginning to end.

> "The federal government may avail itself of evidence procured by state officers through an illegal search and seizure *providing no federal officer or agent has participated therein.*"
>
> *Milburne v. U. S.*, 77 Fed.(2d) 311.

Counsel takes the following quotation from *Byars v. U. S.*, 273 U. S. 28, 47 Sup. Ct. 248:

> "* * * the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking * * *"

Counsel, however, should have continued to quote from this case, to show that *if such officer was present in his official capacity as Mr. Pearson was, it was a federal undertaking.*

II.

ERROR IN REFUSING OFFER OF PROOF ON PROCURABILITY OF SEARCH WARRANT.

We devoted some space in our brief to the proposition that the trial court erred in denying defendants an opportunity to show that a search warrant could reasonably have been obtained and submitted that such evidence was relevant. Counsel does not deny that our conception of the law is correct, but justifies the action of the court in denying the offer of proof upon statements made by certain witnesses for the government, *in the course of the trial,* that they did not have

sufficient facts to obtain a search warrant. It was immaterial what they said on the trial. Robert Chang filed in advance of trial a motion to suppress, and in the course of proceedings on the motion, the defendant properly offered to show that the officers had facts upon which they could reasonably have obtained a search warrant (R. pp. 66-71), and we submit this offer was improperly denied.

> "* * * the search and seizure without first procuring a search warrant may well have been unreasonable in view of the abundant opportunities the officers had to obtain one."
>
> *Milburne v. U. S.,* supra.

Commenting on this same situation, the Supreme Court in *Taylor v. U. S.,* 286 U. S. 1, 52 Sup. Ct. 466, said, in referring to the neglect of officers to obtain a search warrant:

> "They had abundant opportunity to do so and to proceed in an orderly way * * *"

Their neglect made the search and seizure unreasonable.

III.

NO CONSENT TO SEARCH.

It would be pointless to prolong this brief with further discussion of the question of whether the defendant, Robert Chang, consented to the search of his room. Courts have frequently said that each case must turn upon its peculiar facts where government

agents rely upon consent as an excuse for not obtaining a search warrant. During the years of judicial history under the Eighteenth Amendment, a great many cases arose which superficially would appear to be in some discord, but only superficially, because it is now universally conceded that consent to a search, so as to amount to a waiver of the applicable constitutional right, must be freely and voluntarily given out of desire and willingness to have the search take place, and not such a consent as might be wrung from the frightened lips of a boy shoved upstairs by high-pressure officers, *demanding* "permission" to search his room (R. pp. 53; 65).

IV.

UNLAWFUL IMPRISONMENT.

Counsel has said nothing in his brief which shows any warrant whatever for the prolonged incarceration of the defendants and the infant without charge and without opportunity to make bail. We concede that officers, under certain circumstances, may arrest a person without warrant but the arrested person has a right to be charged within a reasonable time and this is so whether proceeding under provisions of federal law or local law. These defendants were held for no other purpose than to compel them to give evidence against themselves, coercion by durance.

V.

CONFESSION EVIDENCE AGAINST MAKER ONLY.

We pointed out in our opening brief that the court erred in instructing the jury that the confession of Mrs. Ah Fook Chang could be considered as evidence against Robert Chang and we showed that Robert Chang had never read over Mrs. Ah Fook Chang's confession and, apparently, did not know what it contained. Counsel would have the court hold that the court's action in this respect was not error. At the trial counsel recognized that the woman's confession was not evidence against the boy. When the request was made that the familiar instruction be given to the jury that the confession of one defendant was not evidence against the other, counsel said:

> "We have no objection to the jury being so instructed for the reason that with this particular statement (Mrs. Ah Fook Chang's) there is no evidence that Robert Chang was asked whether or not this statement was correct." (R. p. 152)

Counsel was franker in the trial of this case than he has been in his brief. When the court disregarded the prosecution's consent on limiting the confession to the party making it, the judge asked the witness on the stand, being the officer who took the confession, the following questions:

> "Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?
> A. Yes sir.
> Q. He *heard* the statement read to her?

A. We was sitting in the room to my right; Mrs. Ah Fook Chang was on the left of the table." (R. pp. 151-153)

Note how the witness sparred away the question. He would not state that Robert Chang heard this confession. As far as he would go was to say that the defendant was on the right of him. We don't know, from the answer, whether the defendant was one foot or fifty feet on his right side, or whether he could hear or had any conception whatever of what was contained in the paper his mother signed. Of course, the court erred in denying this request, just as he erred in the latter part of the proceedings when the foreman was instructed that the confession of one defendant was a confession of all.

VI.

ERROR IN INSTRUCTING FOREMAN.

It is a rule of criminal law that defendants in a trial for a felony must be present at each and every stage of the trial (16. *C. J.* 813 and cases cited). The communication between the judge and the foreman of the jury was in the absence of the defendants. This communication must be considered as a stage in the trial and the court had no right to instruct the foreman in the absence of the defendants. Of course, the whole proceedings were irregular. It is elementary that any instruction for the jury must be given to

the jury in open court by the judge and he may not delegate the matter to a single juror.

> "All communications between the judge and the jury, after they have retired to consider their verdict, must be made in open court, accused and his counsel being present, and it is error for the judge, in the absense, or without the hearing, of defendant and counsel, to have communication with the jury while they are deliberating."
>
> 16 *C. J.* 1090.

> "Although there is authority to the contrary, as a general rule, it is error to repeat a charge to the jury or to give them additional instructions in the absence of accused, the presence of his counsel does not cure the error."
>
> 16 *C. J.* 1089.

In this case, we submit it was error for the court to instruct one member of the jury in the absence of the others; to instruct elsewhere than in open court; and to instruct in the absence of accused. And, of course, the instruction itself was thoroughly erroneous.

VII.

COURT SHOULD HAVE DEFINED "VOLUNTARY".

When a confession is admitted, in a case where its voluntary character is conceded, an instruction defining "voluntary" would be unnecessary, for the obvious reason that it was not an issue. But in this trial, defendants challenged from the beginning the

voluntary character of the confession, claimed it was obtained by duress and coercion and asked that it be excluded. Before trial, they testified at length in support of a motion to suppress and on the trial, while they themselves did not testify, the government agents were questioned by defendants' counsel, practically the entire interrogation being devoted to the question of the voluntary character of the confession. This interrogation brought out that defendants had been held in jail for a long period without bail, without normal nourishment, and had been interrogated for many hours, under circumstances at least tending to show both duress and coercion. Manifestly enough was developed to leave the jury free to conclude, if it desired, that the confessions were not, in fact, free and voluntary *(Wilson v. U. S.,* 162 U. S. 313, 16 Sup. Ct. 895 at 899). The importance to the defendants of the requested instruction defining the meaning of free and voluntary is self-evident.

It is respectfully submitted that this cause should be reversed and defendants discharged.

Respectfully submitted,
E. J. Botts,
Attorney for Appellants.

Receipt of a copy of the foregoing Closing Brief on Behalf of Appellants is hereby acknowledged, this 12th day of February, A. D. 1937.

Willson C. Moore,
Assistant U. S. District Attorney.

No. 8352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias Kam Yuen and ROBERT CHANG, alias Yuk Moon,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

Mrs. Chun Doon, a resident of Hilo, wrote to one Dang Wing Kong, of Wailluku, Maui, requesting twenty-four (24) tins of opium be brought to Hilo (R. p. 16). Thereafter, Dang Wing Kong communicated with Mrs. Ah Fook Chang, asking her if her son Robert wished to make the trip (R. p. 15), which Robert thereafter agreed to do. The Defendant, Robert Chang, then came to Honolulu and obtained the twenty-four tins of opium from one Hong Yin Pin and left Honolulu on that same day on a steamer for

Hilo, arriving at Hilo on December 18th (R. p. 15). He was accompanied to Hilo by his mother and co-defendant, Mrs. Ah Fook Chang. On arrival Robert Chang obtained a room at the Maunakea Rooming House (R. p. 52).

In the afternoon of December 18th George J. Richardson, Inspector of Police for the County of Hawaii, who has been in the Hilo Police Department for fifteen or sixten years (R. p. 99), detailed Police Officers R. Takamoto and Antone Pacheco, who were accompanied by Investigator Lee A. Pearson, to keep Robert Chang under surveillance (R. p. 120), which they did from about 5 P. M. to 7 P. M., at which time they saw Robert Chang coming out of the Maunakea Rooming House. When they (the Police Officers) approached, revealed their identity, and said to him "We want to look into your room. Can you give us permission to go into your room?", Chang replied "O. K." (R. p. 118) and without any threats or intimidation on the part of the officers Robert Chang led them to his room on the second floor of the Rooming House. Upon arrival at the door he took a key from his pocket, went into the room, turned on the light, and said "Come in"; that thereupon they entered the room (R. p. 119). Robert Chang was then asked what was in a suitcase that was lying on the floor. Chang opened the suitcase and told them to go ahead and see what was in it. In the suitcase they found a package containing twelve (12) tins of opium, and in a similar package on the table they found twelve (12) more tins of smoking opium (R. p. 119).

Thereafter, Police Officer Antone Pacheco and Inspector Richardson went to the vicinity of Mrs. Chun Doon's store. Police Officer Pacheco went into the store, where he found Mrs. Ah Fook Chang talking to Mrs. Chun Doon. He asked her if Robert Chang was her son and upon receiving a reply in the affirmative he asked her to accompany him to the Maunakea Rooming House (R. p. 134). He took her across the street where Mr. Richardson was waiting in his car (R. p. 107) and they then proceeded to Robert Chang's room where the two boxes of opium were shown her. Thereafter, both Defendants were taken by the Police Officers to the Police Station and booked by Inspector Richardson for investigation to the Hilo Police Department (R. p. 99), where they remained booked until 9 or 10 o'clock of the evening of December 19th.

At about the hour of 2 P. M. on December 19th, Federal Narcotic Officer William K. Wells arrived by airplane (R. p. 101) which was late in reaching Hilo, and at about 3 o'clock on the same day the two Defendants were questioned in the office of Inspector Richardson. During the entire questioning there were no threats or bull-dozing (R. p. 111). The questioning was conducted in an ordinary tone of voice. The windows were open and the door was open part of the time (R. p. 123). The Defendants were each told that "they didn't have to make any statement if they didn't want to" (R. p. 123). A statement of each of these Defendants was taken on the afternoon of December 19th, but during the dinner hour Police Officer Antone Pacheco had a conversation with Mrs. Ah Fook Chang

in which she informed Mr. Pacheco "that a fellow from Honolulu wrote to her for her to send her son down to get this opium, and then the son would meet her at Maui, going to Hilo" (R. p. 109). This statement did not agree with the statement she had given to the Officers in the afternoon, and Officer Pacheco conveyed this information to Narcotic Agent Wells (R. p. 109) and that after dinner, and in the evening of December 19th, other statements, which are the statements introduced in evidence, were taken by the Police and Federal Officers, the questioning being principally done by Inspector George G. Richardson and William K. Wells of the Narcotic force (R. pp. 100, 122).

The Defendant, Mrs. Ah Fook Chang, was very anxious to help her boy out of trouble and tried to get the Officers to promise not to put him in jail. This, of course, they could not and would not do (R. p. 112).

During the entire confinement of the Defendants up to the time the confessions were signed, they were in the custody of, and booked by, the Territorial police officers of the Island of Hawaii (R. p. 99). They were not mistreated or threatened in any way. On the morning of the 20th of December a Commissioner's complaint was issued by the United States Commissioner in Hilo and they were charged with violations of the Federal narcotic laws (R. p. 112).

The Defendant, Robert Chang, stated, in substance, that the reason he signed the confession and permitted the Officers to search the room was that he was afraid they were going to lick him (R. pp. 97, 56). The De-

fendant, Mrs. Ah Fook Chang, stated the reason that she signed the confession was, in substance, that they would not let her telephone to anyone, let her sleep (R. p. 88), or give her sufficient food (R. pp. 82, 83), that four or five officials were questioning her continually, and because of having an infant child with her (R. p. 88), wanted to get away and get out of custody. On the other hand, it appears from the Officers that Robert Chang was not threatened in any manner, shape or form. When permission was sought to search his room the man was not threatened in any way and he readily consented to the search (R. pp. 67, 63), and upon cross-examination of Robert Chang at the hearings before the Court he was very reticent to answer questions and evaded the issue as much as possible (R. p. 54), while on the other hand, when questioned by his own counsel, very glibly stated that "numerous and sundry threats were made", but when being pinned down to what actualy happened along that line he had nothing definite to say; that when Robert was questioned at the Police Station he was questioned by the Officers in an ordinary tone of voice, was not badgered or threatened in any way (R. pp. 106, 100, 101, 110, 111).

With reference to the Defendant, Mrs. Ah Fook Chang, she was taken to the Police Station with her child—she being a resident of the Island of Maui (R. p. 81) and not of the Island of Hawaii, there was nothing else to do with her child but let it remain with her—that during the time she was confined there by the Hilo Police Department she was given the same

prison fare as anyone else and, in addition to having available to her the regular prison fare, was permitted to purchase anything she wanted for herself and baby, and did on at least one occasion ask a Police Officer to go out and get certain food for her, which he did (R. p. 105). That during the whole period of her confinement she was not badgered or mistreated in any way, shape or form. That she was principally interested in her boy's welfare and that the statements signed by herself and her son were made in the absence of any threats or promises of immunity or hope of reward (R. p. 112).

After the indictment a motion to suppress the evidence seized in the Maunakea Rooming House was filed, heard and denied. Thereafter, a motion to suppress the confessions was filed and after a hearing they were denied. Upon the trial the chief witnesses were called in behalf of the Government and upon the Government closing its case counsel for the Defendants attempted to have the testimony of the two Defendants taken upon the hearings for the suppression of the confessions read to the jury and considered by it (R. p. 158), which was denied, and the defense rested without putting on any evidence.

ARGUMENT.

I.

ILLEGAL SEARCH AND SEIZURE.

(A) Search made without a search warrant.

(B) Evidence obtained by state officers may be used by Federal Government.

(C) Voluntary consent was given to make the search.

(D) The question of voluntary consent ruled on with ample evidence to suport finding will not be disturbed.

(E) Offer of proof regarding demand for search properly denied.

(F) A search warrant could not be easily obtained.

(A) It is and has been admitted throughout the entire proceeding that the officers had no Search Warrant.

(B) It is not conceded that the search in this case was a Federal search as Police Officers were detailed by their superior to keep the Defendants *under surveillance* (R. p. 127); that it has been the practice in Hilo in narcotic or liquor cases for the Territorial courts to prosecute the smaller cases, while the larger ones were turned over to the Federal authorities, and that each had turned over cases to the other, but "that in this particular case the investigation was being made by him *as a Hilo police officer* assisted by Mr. Pearson, a Federal officer" (R. p. 131). (Mr. Pearson is an investigator with the Alcohol Tax Unit in Hilo, Hawaii). After the seizure, the Federal Narcotic Division was notified and Mr. Wells, a Narcotic Agent, arrived the next day (R. p. 131). The Defendants were booked for investigation to the Hilo Police Department (R. p. 99) and were turned over

to the Federal authorities on December 20th (R. p. 132).

Byars v. U. S., 273 U. S. 28, is a counterfeiting case and there were no laws in Iowa in that regard, while in the present case Chapter 42 of the *Revised Laws of Hawaii 1935* provides:

> "It shall be unlawful for any person to produce, manufacture, possess, have under his control, sell * * * any habit forming drug" (cocoa leaves and opium) "except as provided".
>
> Sec. 1272, *Revised Laws of Hawaii 1935,*

making the usual exceptions of physicians, dentists, etc., and in Hawaii a

> "policeman, or other officers of justice, in any seaport or town, even in cases where it is not certain that an offense has been committed, *may,* without warrant, arrest and detain for *examination* such persons as may be found under such circumstances as justify a reasonable suspicion that they have committed or intend to commit an offense."
>
> Sec. 5403, *Revised Laws of Hawaii 1935.*

This was done in this case and

> "the mere participation in a state search by one who is a federal officer does not render it a federal undertaking."
>
> *Byars v. U. S.,* 273 U. S. 28(a) 32,

even though the courts should be vigilant in such cases to see that the Constitution is not violated by circuitous methods. In this case it was purely a Ter-

ritorial matter, at least until after the search was consummated.

No matter whether the search was a legal one or not, it being a Territorial matter and the violation being both a Territorial and Federal offense, the evidence is admissible in a Federal court, for a recent case in which certiorari was denied the court said:

> "If it be assumed that the search and seizure were illegal, the evidence was nevertheless properly received, since evidence wrongly secured by state officers is admissible in prosecutions for federal crimes."
>
> *Burkis v. U. S.,* 60 F. (2d) 542 (Cert. denied, 287 U. S. 655), 77 L. Ed. 566.

See, also:

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652;
Wharton's Crim. Ev., 11th Ed., Vol. 1, p. 375;
Rice v. U. S., 251 Fed. 778 (1 C. C. A.);
Kanellos v. U. S., 282 Fed. 462 (4 C. C. A.).

During the days of prohibition the trend of decisions was to hold inadmissible evidence obtained by an unlawful search in which Federal agents participated, but at present the criterion is whether or not the state officers were enforcing state laws, and in the case at bar there is a Territorial violation which distinguishes it from *Byars v. U. S.,* supra, and *Gambino v. U. S.,* 275 U. S. 310, 72 L. Ed. 293.

(C) The search in this case, even though it should be construed to be a Federal search, is a legal and valid one. Robert Chang is twenty-four years old, had a fifth grade education and had the experience of

travel to China (R. p. 51) and was smart enough to be selected by an opium peddler to go to Honolulu from Maui to get twenty-four (24) five-tael tins of opium and to take the same to Hilo, deliver it, and collect $3000, and take it back to Maui with him (R. pp. 142-143). He also was smart enough so that he would not deliver the purchase money to Hong Yin Pin until the opium was delivered (R. p. 141). He arrived in Hilo on the morning of the 18th but had not delivered the opium at 7:00 P. M. to Mrs. Chun Doon, the prospective purchaser.

When questioned by counsel in support of the Motion to Suppress Evidence with reference to going to and opening his room which was searched, he readily replied in effect that he was afraid he would be licked and that the officers shoved him and demanded that he open his door and the suitcase (R. pp. 52-54), while on cross-examination he stated he did not know there was any opium in his room (R. p. 56) and that he had no fear of them finding opium there but that all he was afraid of was that they might lick him (R. pp. 57-58) and that he "didn't remember" whether he had told Mr. Wells that he had given the officers permission to search his room and was evasive in his answers (R. pp. 58-59) and then, on redirect examination, he changed his story, when led by counsel, that he knew there was opium in his room (R. p. 60). The three officers who were present all stated that there were no threats made and permission was voluntarily given and that Robert led the way and after unlocking the door invited them in (R. p. 62), and told them to "go ahead and look around" (R. p. 66).

It is conceded that a defendant may waive his constitutional rights under the Fourth Amendment but it is contended that the waiver claimed here was not voluntary, and cites in support thereof several cases holding that consent was not voluntary. We will review them briefly to show their inapplicability.

In the case of *Herter v. U. S.* (C. C. A.—9), 27 F. (2d) 521, a federal officer went to defendant's home and accused him of running a still and said that he had come after it. Defendant denied having a still. Then the officer replied "If you have not, you do not mind my looking for it" and said that the defendant then invited him in. This was denied throughout by defendant and his wife, who stated that consent was refused. In the case at bar the officers' statements as to consent are corroborated by the written testimony of defendant (R. pp. 13, 14) and the absence of any denial that he, Robert Chang, had given them permission.

In the case of *U. S. v. Baldocci* (D. C. (A1)), 42 F. (2d) 567, a narcotic officer after arresting the defendant told the defendant that he knew where he lived, drove the defendant there, and then said to defendant "will you allow me to enter, or will I go and obtain a search warrant". To which defendant replied, "All right, you may enter".

In the case of *U. S. v. Kelih* (D. C.), 272 Fed. 484, the officers went to the premises armed with a faulty search warrant which they believed to be valid and the defendant attempted to stop them.

In the case of *U. S. v. Rembert* (D. C.), 284 Fed. 996, the officers stopped defendant's car on a highway about midnight because it was zigzagging along, searched it, and found liquor. No request for a search or consent was asked or given.

In the case of *U. S. v. Shuser* (D. C.), 270 Fed. 818, officers went to the premises without a search warrant and said "they were there to search for liquor", to which the defendant replied "All right. Go ahead".

In the case of *Territory v. Ho Me.,* 26 Haw. 330, the defendant had left his room, closed and locked the door. He was arrested, searched, and a key taken from him which the officers used to open the door to his premises, and then proceeded to search. No consent to search was asked or obtained.

In the case of *U. S. v. Kozan* (D. C.), 37 F. (2d) 415, an officer searched the liquor stockroom of a drug store. No consent was asked or given.

In the case of *U. S. v. Marra* (D. C.), 40 F. (2d) 271, prohibition officers went to defendant's door and told defendant who they were and that they "were going to inspect the premises". Defendant replied "All right".

In the case of *Brown v. U. S.* (C. C. A.—5), 83 F. (2d) 383, the officers went in by virtue of an invalid search warrant and no consent was asked or given.

In the case of *U. S. v. Lee* (C. C. A.—2), 83 F. (2d) 195, there was a search made without a warrant, without consent, and not as an incident of a lawful arrest.

In the case of *Amos v. U. S.*, 255 U. S. 313, the officers went to defendant's home and said they "had come to search the premises" for violations of the Revenue law. The defendant then opened the door and they entered and searched. No consent was asked or obtained.

In the case of *Farris v. U. S.* (C. C. A.—9), 27 F. (2d) 521, officers entered without permission and then said they had to "look over or search the house". Defendant replied "All right. You will find nothing here now".

None of the cases cited by appellant with reference to consent come within the facts in the case at bar. They deal with situations which show an implied coercive demand, amounting to creating the impression that they are going to search, irrespective of consent. The consent under such circumstances amounted merely to a lock of resistance on the part of defendant. Where there has been a request made by officers to make a search without any threats or coercion under facts similar to this case and consent has been given, evidence so found has always been held to be admissible.

In the case of *Dillon v. U. S.* (C. C. A.—2), 279 Fed. 639, at 646, officers went into a hotel bar, saw two men drinking, seized the liquor. They asked defendant's permission to search the premises and to accompany them on the search. Defendant replied "Certainly; I will show you through everywheres". He got his keys, took them through the hotel. Liquor was found in the icehouse. The court said:

> "We are unable to see that the search violated his constitutional rights."

In the case of *U. S. v. Smith* (D. C.), 46 F. (2d) 82, the officers walked up to defendant, asked him if he occupied the premises, said they were police officers and had a complaint of a fire hazard in the form of a still. Defendant denied having a "still in the house. You can go right in and look through the place if you want to". Liquor was found but no still. The evidence was held admissible.

In the case of *Hilt v. U. S.* (C. C. A.—5), 12 F. (2d) 504, the captain of the vessel searched admitted there was liquor aboard and gave the officers permission to search. The vessel was pursued and overtaken by the officers in a revenue cutter. The court said:

> "A warrant is unnecessary where the search made made after admission of a fact under circumstances that tend to show the law is being violated, and by *consent of the party entitled to object.*"

In the case of *Waxman* (C. C. A.—9), 12 F. (2d) 775, officers went to defendant's house, told him they could smell "a strong odor of mash coming from the house" and that there must be a still on the place. This defendant denied, and said "You can go and look" or "Go ahead and find it, then". A still was found. The court held:

> "We do not deem it necessary, however, to consider the question of the right of search, because the court below was fully justified in finding that

> the 'defendant' consented thereto, and, having consented, is in no position to claim that his constitutional rights were invaded."

Certiorari was denied. 273 U. S. 716.

In the case of *Huhman v. U. S.* (C. C. A.—8), 42 F. (2d) 733, the officers had a warrant for the dwelling but none for the still house a half mile away. The officers informed the defendant that they knew of its existence and, learning this, defendant said "All right, if you know where it is" and *led the way to the still house.* The court said in this connection "by so doing he waived his right to assert or claim that the searches and seizures made were unreasonable".

See, also:

Giacolone v. U. S. (C. C. A.—9), 13 F. (2d) 110;

Cantrell v. U. S. (C. C. A.—5), 15 F. (2d) 953;

Gatterdam v. U. S. (C. C. A.—6), 5 F. (2d) 673;

Hodges v. U. S. (C. C. A.—10), 35 F. (2d) 594.

(D) The question of an illegal search and seizure in this case was raised before trial and evidence was adduced on both sides and the Court in hearing the Motion stated that the question to be decided was whether the consent to search was voluntarily given or obtained by coercion (R. p. 69), and by overruling the Motion (R. p. 72) found as a fact that the consent was voluntary and without coercion.

In the case of *Schutte v. U. S.* (C. C. A.—6), 21 F. (2d) 830, the court said:

> "In the search of a dwelling made by consent, no search warrant is necessary. * * * As to whether such consent was freely given, there was a question of fact. The court found as a fact that consent was given and without duress; this conclusion was amply supported by the evidence; no question of law thereon remains for review."

In the case of *Baldwin v. U. S.* (C. C. A.—6), 5 F. (2d) 133, the court stated:

> "According to some authorities his (court's) finding upon a perliminary quest of admissibility is conclusive and will not be reviewed; but in any event, his finding carries the same weight as the finding of a jury upon a disputed issue of fact and will not be disturbed by a reviewing court unless error is manifest."

On the question of admissibility of evidence where the question of its admissibility became one of fact the Supreme Court has said:

> "We have no hesitation in saying that the finding of the court below is, at least to have the effect of a verdict of a jury upon a question of fact, and should not be disturbed unless the error is manifest."
>
> *Reynolds v. U. S.,* 98 U. S. 145, at 159; 154 L. Ed. 244.

See also:

Hale v. U. S. (C. C. A.—8), 25 F. (2d) 430, 437;

Bram v. U. S., 168 U. S. 532, 555; 42 L. Ed. 568;

Magnum v. U. S. (C. C. A.—9), 289 Fed. 213, 215;

Rossi v. U. S. (C. C. A.—9), 278 Fed. 349, 353.

(D) Denial of Request to have former testimony considered. The request to have the testimony of defendants upon the Motions to Suppress was properly denied. The defendants were available and present in court at the time of the request.

> "Testimony taken at trial cannot be read at a subsequent trial if the witness is obtainable." *Wharton, Crim. Evid.,* 11th Ed. p. 1126.

(E) The offer of proof complained of by appellants, which was denied, was an attempt on the part of counsel during the hearing on the Motion to Suppress evidence to go on a fishing expedition. The question then before the court was whether the search made of the Defendant, Robert Chang's, room at about 7:00 P. M. December 18, 1935, was made with Defendant's voluntary consent. In substance, his offer was to prove by cross-examination of Government witnesses, without making or offering to make them his own, that the Police Officers shadowed Defendants in Hilo from 5 P. M. to 7 P. M. and when they thought the auspicious moment had arrived, approached Robert Chang, demanded permission to search his room (R. p. 65) and intimidated or forced him against his will to open his door (R. p. 69). Counsel admits that what happened from 7 P. M. on

had been related in the evidence (R. p. 70). Robert Chang testified that he first saw them at about 7 P. M. of that day (R. p. 52), so there could have been no prior coercion or intimidation.

(F) Inspector of Police Richardson, who was in charge of the investigation, stated that on the morning of December 18th he received information that the Defendants had opium, but his information was not positive as to where it was (R. p. 127). The witness Pearson testified that he did not have any facts upon which he could obtain a search warrant (R. p. 124). So it patently appears that any effort to obtain a warrant would have been fruitless.

II.

CONFESSIONS OF MRS. AH FOOK CHANG AND ROBERT CHANG.

(A) Confessions made while in custody.

(B) Refusal of defendants' proposed instructions with reference to confessions.

(C) A confession is presumed to be voluntary.

(A) The Defendants in this case were in custody of the Territory when their confession were obtained, having been booked for investigation by Inspector Richardson on December 18, 1935, at 7:26 P. M. (R. p. 107) and so remained until about 10 P. M. December 19, 1935 (R. p. 99). They were not mistreated in any way during their incarceration. There were no threats or promises and they were told that they

did not have to make any statement if they did not want to (R. pp. 110, 111, 123).

> "The mere fact that a confession is made while the maker is in the custody of a police officer, or even while confined under arrest, is not sufficient of itself to effect its admissibility, providing that it is otherwise voluntarily made. This rule pertains equally whether the arrest is legal or illegal."
>
> *Wharton's Crim. Evid.*, 11th Ed., p. 1023.

> "The fact that he (defendant) is in custody and manacled does not necessarily render his statement (confession) involuntary, nor is that necessarily the effect of popular excitement shortly preceding."
>
> *Wilson v. U. S.*, 162 U. S. 613, at 623; 40 L. Ed. 1090.

(B) Refusal of Defendants' proposed instructions with reference to confessions. In this case, as in the case of *Lewis v. U. S.* (C. C. A.—9), 74 F. (2d) 175, the only evidence adduced on the part of the Defendant as to the confession being involuntary was in the absence of the jury. Plaintiff upon the evidence in the case in chief again showed that the confessions were free and voluntary (R. pp. 123, 126-127, 132, 134, 136-137). At the conclusion of Plaintiff's case Defendants' counsel endeavored to have the sworn testimony of Defendants read into evidence. This was objected to as it did not give the Plaintiff an opportunity to cross-examine the Defendants on the case in chief (R. p. 159) to which it would have been entitled. The

objection was sustained. Defendant was accorded the right to produce evidence by the Defendants but elected not to put them on the stand (R. pp. 161, 162).

> "It thus appears that the evidence before the court bearing upon the admissibility of the confession and the evidence before the jury upon the same subject were different, and that the ruling of the court admitting the confession was based upon one state of the evidence and the verdict of the jury upon another. This distinction is important in considering the assignments of error as to instructions given to the jury and the refusal of appellant's proposed instructions." (Page 175). "* * * The defendant proposed fourteen instructions to the jury, bearing upon the question of the rejection of the evidence of confessions in the event the jury determined that the confessions were involuntary. It is a sufficient answer to the exceptions to their refusal to repeat that there is not sufficient conflict in the evidence, as presented to the jury concerning whether or not the confession was voluntary, to justify submission of that question to the jury." (Page 179.)
>
> *Lewis v. U. S.*, supra.

> "That law and practice are that the trial court should, in the absence of the jury, first hear the evidence upon the prima facie case, when the legality and voluntariness of the confession are brought in question, as they usually are, unless defendant pleads guilty. When the court is satisfied that the government has made a prima facie case, making for admissibility, that is, when the evidence discloses that the confession was made without duress, or violence, promises, or threats,

but voluntarily, the jury is called in, and the evidence as to the facts and circumstances of the procurement of the confession is heard by the jury. Evidence contra is, in the course of the trial, offered by the defendant, and the confession, having been admitted on the court's personal finding of prima facie admissibility, is read or detailed to the jury by the witnesses; leaving to the jury, by an appropriate charge, the question as to whether it was in fact unlawfully obtained, for that duress, force, threats, or promises were employed, had, or made in its obtention."

Ramsey v. United States, 33 F. (2d) 699, at 700 (C. C. A.—8).

(C) A confession is presumed to be voluntary.

"Both counsel * * * labored under the erroneous impession that it" (a confession) "was presumptively inadmissible, and that the government carried a heavy burden in establishing the voluntary character of such a statement, which burden was not met, if there was any evidence tending to impeach the statement of those who secured the statement. We do not so understand the law. * * * Admissions are, when freely made, competent evidence. * * * We must give this statement * * * the presumption to which it is entitled, the *presumption* that it was voluntarily made."

Murphy v. U. S. (C. C. A.—7), 285 Fed. 801, at 807 and 808. Cert, denied, 261 U. S. 617.

"The question to be determined by this court with reference to the admissibility of the confession is whether or not the court abused its discretion in admitting the evidence. Mangum v.

U. S. (C. C. A.) 289 F. 213, 215; Hale v. U. S. (C. C. A.) 25 F. (2d) 430, 437. In Mangum v. U. S., supra, this court, speaking through District Judge Bean, stated the rule thus: 'But where on the trial of a criminal case a confession of the defendant is offered in evidence it becomes necessary for the trial court to ascertain and determine as a preliminary question of fact, whether it was freely and voluntarily made, and whether the previous undue influence, if any, had ceased to operate upon the mind of the defendant. In doing so, the court is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown. State v. Rogoway, 45 Or. 601, 78 P. 987, 81 P. 234, 2 Ann. Cas. 431; State v. Squires, 48 N. H. 364''.

Lewis v. U. S., supra.

III.

DEMAND FOR PRODUCTION OF CONFESSION.

During the hearing on the Motion to Suppress the confession of the Defendant, Mrs. Ah Fook Chang (the confession of Robert Chang was not requested to be suppressed, although its admission was objected to (R. p. 139)), a request was made for the production of her confession. The only thing at issue was whether or not it was voluntary. This has nothing to do with its contents. Counsel at the time gave no authority for his request nor has he in his brief on appeal. The answer is obvious. There is none.

"However, in criminal cases, it is very evident that the accused cannot compel the prosecution to produce documents which he himself has made. Thus he is *not entitled* to have incriminating letters, written by him, produced for his inspection; nor to have produced *a statement made and signed by him* even on the ground that such statement is material to his defense."

Wharton's Crim. Evid., 11th Ed., Vol. II, p. 1354.

A collection of cases on this point may be found, if needed, in the notes to the last citation.

IV.

INSTRUCTION ON VOLUNTARINESS OF CONFESSION GIVEN.

An instruction was given with regard to whether or not the confession was voluntary (R. pp. 171-173) and the jury in convicting the Defendants found that they were voluntary.

V.

CONFESSION ONLY EVIDENCE AGAINST PARTY MAKING IT.

In counsel's Opening Brief he has charged that the officers "glibly testify", "reel off the formula with the monotony of a court clerk", that their getting permission to search as "colorless and flaccid" and that their testimony as to the lack of threats or force "is senseless". An Honorable Judge decided otherwise.

It is quite possible that the above assertions bear as much truth as the following assertion in appellants' brief:

> "In this case the record does not disclose that Robert Chang even knew that Mrs. Ah Fook Chang had made a confession, or if so, what it contained." (Appellants' Brief, p. 44.)

The Court asked the witness Wells, referring to the confession of Mrs. Ah Fook Chang:

> "Q. At the time this statement was read to Mrs. Ah Fook Chang was Robert Chang present?
>
> A. Yes sir.
>
> Q. He heard the statement read to her?
>
> A. He was sitting in the room on my right; Mrs. Ah Fook Chang was on the left of the table.
>
> The Court. It appearing that this statement was made in the presence of the defendant Robert Chang, the instruction will not be given."

> "The general rule regarding the inadmissibility of the confessions and admissions of guilt of co-conspirators and codefendants is usually stated by the courts with the proviso that such statements are inadmissible when made in the absence of the defendant. This is for the reason that a confession or admission of a co-conspirator or co-defendant may be admissible if made in the presence of the accused and assented to by him, either expressly, impliedly, or tacitly by silence or conduct. In such case then, the confession or admission of the co-conspirator or codefendant loses its inherent nature and becomes evidence which is merely incidental and coupled to the statement or conduct of the defendant in affirming and assent-

> ing to the truth of the statement made. It is really, then, not the confession or admission of a co-conspirator or codefendant which is admissible against the defendant in this situation, but his statement, action, or reaction thereto, and primarily a confession or admission of the defendant is had by assent or adoption. * * *"
>
> *Wharton's Criminal Evidence,* 11th Ed., Vol. 2, p. 1216.

In this case, *Bachelor v. State,* 216 Ala. 356, 113 So. 67, at 70, where a confession of one was sought to be used against another, the court said:

> "It was necessary for the State to show that it was made in the presence of the defendant and he remained silent or that he affirmed the truth of the statement."

See also:

People v. Carmichael, 314 Ill. 460, 145 N. E. 673;

Sutton v. Commonwealth, 207 Ky. 597, 269 S. W. 754.

In the case at bar the evidence shows that the Defendant, Mrs. Ah Fook Chang, urged her son, Robert, to tell the truth (R. pp. 101, 145); that she was present when the confession was made (R. p. 145) and upon it being signed by Robert Chang Mrs. Ah Fook Chang was asked whether or not it was true and she replied that it was true. Thereafter, Mrs. Ah Fook Chang's confession was taken. It is in absolute conformity with her son's. He was present when it was read to her. There is not one substantial thing in this con-

fession which is not Robert's confession, which she assented to. So that if any error has been committed it is harmless.

VI.

COURT'S INSTRUCTION TO JURY FOREMAN.

The Foreman of the Jury came to the Judge's Chambers where counsel for both parties were present, and asked if the confessions could be considered against both Defendants. The Judge again adhered to his former ruling. In the cases cited by Defendants the facts were far different than in the instant case. In the case of *Fillipon v. Albion Vein Slate Company* in reply to an inquiry of the jury during its deliberations sent an instruction to them covering the inquiry. Neither counsel nor parties were present. The court said:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict."
>
> *Fillipon v. Albion Vein Slate Company,* 250 U. S. 76, at 81.

In the case of *Little v. U. S.,* 73 F. (2d) 861 (C. C. A.—10), a stenographer was sent to the jury room to read the instructions theretofore given by the court. The defendant or his counsel were not present.

In the case of *Mattox v. U. S.,* 146 U. S. 140, at 150, 36 L. Ed. 917, the jury during its deliberations read a newspaper article about the case, which set out that the defendant had been tried for his life once before; that the evidence was very strong against him, and that his friends had given up hope of the jury doing anything but convicting. Mr. Chief Justice Taney said:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are asolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."
>
> *Mattox v. U. S.,* supra.

In the case at bar all that was done was by the Court in the presence of counsel and only reiterated what had already been given in an instruction. Certainly this is harmless and comes within the exception. The record shows an exception to the Court's adhering to its original ruling with reference to the confession, but no exception to any irregularity of the incident in chambers was taken or was it raised in the Motion for a New Trial.

> "Subject to a few exceptions, the rule is of almost universal application, in many jurisdictions by virtue of express statutory provision, that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal; * * *"
>
> *Corpus Juris Secundum,* Vol. 4, page 430.

"It is well settled by a long line of decisions that before error can be sustained to any part of the charge given it must be excepted to and the attention of the judge called to the precise point as to which it is supposed he has erred. The sound reason for this is to enable the judge to reconsider the part of the charge objected to and correct it, if in his judgment it would be proper to do so. Beaver v. Taylor, 93 U. S. 46-54, 23 L. Ed. 797; Pennsylvania R. R. Co. v. Minds, 250 U. S. 368-375, 39 S. Ct. 531, 63 L. Ed. 1039."

Taylor v. United States, 71 F. (2d) 76, at 78.

CONCLUSION.

It is apparent from the record in this case that the Defendants, through their counsel, after hearing the evidence adduced on behalf of the Government on the Motions to Suppress the evidence seized in the room of Robert Chang and to suppress the confession of Mrs. Ah Fook Chang, were satisfied that the evidence was legally seized and the confessions were voluntary in law. Had it been otherwise they certainly would have followed the usual procedure, especially as to the confessions, and put in evidence on their own behalf during the trial tending to show that they were not voluntary, for the benefit of the jury. This they did not do and, of course, it patently appeared by the Plaintiff's evidence that the confessions were in law and in fact voluntary.

There was ample evidence to sustain the Court's ruling that the search was a permissive search.

With reference to the admission of the confession of Mrs. Ah Fook Chang against Robert Chang, it was shown that this confession was read to the mother in the presence of her son; that it did not contain any substantial difference from the facts confessed to in the statement of Robert Chang. So, if there be any error in that regard, it certainly was harmless.

With reference to the confession of Robert Chang—which was considerably more extensive than that of his mother—that confession was admissible as against both Defendants for the reason that after it was read and explained to the Defendant, Robert Chang, in the presence of his mother, she stated to the officers that it was true. The conduct of the Judge in reiterating to the Foreman—not in the presence of the balance of the jury and in the Judge's chambers—that the confessions were admissible as to both Defendants was made in the presence of respective counsel. Had counsel objected to the manner in which this Instruction was given, he certainly would have covered it by his own affidavit for diminution of the record, or, at least when the jury returned a verdict in open court. This he did not do and no objection or exception was made or saved.

Therefore, it is respectfully contended that there is no sufficient ground or reason for overturning the verdict of the trial court.

Dated, Honolulu, T. H.,
February 17, 1937.

Respectfully submitted,

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Receipt of a copy of the foregoing Brief for Appellee is hereby acknowledged this 5th day of February, 1937.

E. J. BOTTS,
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No. 8352

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MRS. AH FOOK CHANG, alias Kam Yuen, and ROBERT CHANG, alias Yuk Moon,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Table of Authorities Cited

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Constitution and Codes

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

We have carefully considered the opinion rendered in this case by the learned Circuit Court. We have reached the conclusion that it is erroneous, particularly in its treatment of the subject of the presumption of error in connection with criminal appeals. In our opinion the language used by the majority of the court in considering this topic is inconsistent with numerous prior opinions rendered in this circuit. We are also of the opinion that the Court fell into error when it reversed the judgment of the Court below in the absence of any proper objection or exception to the instruction complained of, and also

that the Court erred in reversing the judgment in the absence of any showing of prejudice suffered by appellants.

It will be recalled that this Court has reversed the judgment rendered in the trial Court upon two grounds. The first ground was that the appellants were not personally present at the time of the conference between the foreman of the jury and the judge which occurred in the presence of the attorneys for both parties. The second ground for reversal was that at that conference the Court communicated with and instructed the foreman as the representative of the whole jury. The learned Circuit Court held that this action of the trial Court constituted error and that the Appellate Court *must presume that such error was prejudicial.*

We respectfully submit that under the facts presented such conclusion is untenable and inconsistent with numerous prior rulings of this Court.

In order that our position may be perfectly clear we call attention to the circumstances that occurred as shown by the record. While the jury was deliberating the foreman came to the chambers of the presiding judge and in the presence of the attorney for the appellants, and in the presence of the Assistant United States Attorney, who was trying the case for the Government, informed the Judge that the jury wished to be advised if the confession of one defendant in the case could be considered as evidence against the other. The Court thereupon informed the foreman in the presence of both of the attorneys mentioned, that

the confession made by one defendant in the case could be considered by the jury as evidence against the other defendant. The Court also refused to give the instruction asked for by appellants' attorney that a confession in the case was only evidence against the party making it, notwithstanding that a co-defendant was present when the confession was being made. This Court held that under the circumstances as shown by the evidence the instruction requested by appellants' attorney was erroneous. (Op. p. 5.) On the trial of the case, when the confession of Mrs. Chang had been offered in evidence, defendants' counsel had asked the Court to instruct the jury that any statements made by Mrs. Chang were not binding upon her co-defendant, Robert Chang. The Court at that time inquired whether or not the latter defendant was present and was informed that he was present at the time the confession was made. The Court thereupon refused to instruct the jury as asked, to the effect that Robert Chang was not bound by Mrs. Chang's confession. (R. pp. 151-152.) It appears then that what the Court did when the foreman appeared in his chambers and asked for advice was merely to reiterate an instruction that it had theretofore given to the jury as a whole. This Court, in its opinion states (p. 7), that "no one knows what the foreman told the rest of the jury. If he repeated correctly the judge's instruction the error would not be prejudicial. If he did not, the error *may* have been prejudicial. *We must presume it prejudicial.*" In other words, the Court holds that it must be presumed that a correct instruction, entirely consistent with the instructions given to the jury as a

whole, was incorrectly reported by the foreman to the jury. We submit that there is no justification in the law, statutory or otherwise, for such a holding, and that it is entirely out of line with all of the decisions of this circuit and with the whole line of decisions that obtain in many other circuits.

There are two lines of authorities dealing with this subject of what may be called presumed injury resulting from error. The subject is considered, this Court will recall, in the case of

Little v. U. S., 73 F. (2d) 861,

decided by the Tenth Circuit Court of Appeals and cited by this Court in the instant case. This Court may also recall that the Court, in the *Little* case, called attention to the fact that there were two lines of authorities dealing with the subject and cited cases exemplifying the two distinct doctrines. One of those doctrines, it held, was illustrated by such cases as

Marron v. U. S., 18 F. (2d) 218,

which was decided by this Ninth Circuit Court of Appeals. The Court, in the *Little* case, pointed out that the line of authorities exemplified by the *Marron* decision had held that since the enactment of the amendment of February 26, 1919, to Section 269 of the Judicial Code (28 USC, Sec. 391), the law is that "an appellant must establish affirmatively *both* substantial error *and* resulting prejudice." (Italics here and elsewhere are ours unless otherwise indicated.) That section of the Judicial Code now provides, it will be recalled, that:

> "On the hearing of any appeal * * * in any case, civil or criminal, the court shall give judg-

> ment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions *which do not affect the substantial rights of the parties.*"

The Court in the *Little* case then cites authorities illustrating the other line of decisions opposed to the doctrine exemplified by the holding of this Court in the *Marron* case, which hold that a verdict may be set aside or reversed on appeal *even though it does "not affirmatively appear that no prejudice resulted from the error."* We submit that an examination of the authorities will reveal, not only that this circuit is definitely committed to the former doctrine, as was pointed out by the Court in the *Little* case, but that the latter doctrine is absolutely unsound. Moreover, we submit that the *Little* case, which is cited by this Court as an authority upon which the majority based their conclusions, is not in fact an authority for such a holding as the majority have enunciated in the Chang case. We so state because the ultimate holding in the *Little* case, after considering the two lines of authorities, was that "where error occurs which *within the range of a reasonable possibility* may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict." It will be noted that as far as the Court goes is to hold that there must be "a reasonable possibility" that error may have influenced the minds of the jury before a reversal will be ordered. This reasonable possibility evidently must be apparent as an inference legitimately drawn from the facts presented. This Court in effect holds that to authorize

a reversal where error is shown the evidence need not be such as to permit an inference that there is a reasonable possibility that the verdict of the jury was affected thereby, but that on the mere showing of error, a presumption of prejudice automatically arises therefrom. We repeat that in our judgment neither the *Little* case nor any of the other cases following the doctrine of the *Little* case lays down any such rule. Moreover, as was pointed out by the Court in the *Little* case, this Circuit is definitely committed to the doctrine that an appellant may not secure a reversal merely on a showing of errors, but that he must show "both substantial error and resulting prejudice."

One of the first cases decided in this circuit to treat the subject under consideration, following the amendment to Section 269 of the Judicial Code, was

Simpson v. U. S., 289 Fed. 188.

In that case Mr. Justice Gilbert, in passing on the claim of error, said:

> "In reviewing a judgment in an appellate court the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial."

He cites Judge Baker of the Seventh Circuit Court of Appeals as having held in the case of

Haywood v. U. S., 268 Fed. 795,

in passing on the meaning of the amendment to the Judicial Code above referred to, that:

> "* * * we gather the congressional intent *to end the practice of holding that an error requires the reversal of the judgment unless the opponent can*

> *affirmatively demonstrate* from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

Mr. Justice Gilbert also quotes Judge Hook who, in the case of

Williams v. U. S., 265 Fed. 625,

held that:

> "Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded."

We ask that this Court weigh the language of Judge Baker in the *Haywood* case (supra), which met with their approval in the *Simpson* case (supra), in the light of the facts as brought out in the Chang case. We ask where the appellants have *"affirmatively demonstrated"* that they have been denied some substantial right whereby they were prevented from having a fair trial, as Judge Baker said was essential before there could be a reversal of a judgment of conviction.

Again, in the case of

Marron v. U. S., 18 F. (2d) 218,

which was cited in the *Little* case (supra), this Court, speaking by District Judge James, laid down the same

doctrine, quoting the language from the *Simpson* case that we have set out above, to the effect that in reviewing a judgment in an Appellate Court the burden is upon the plaintiff in error to prove that error in the admission of testimony was prejudicial. It will be observed that although Judge Rudkin dissented from the holding of the majority in the *Williams* case, he joined in the holding in the *Marron* case.

We next call attention to the decision of the Court in the case of

Lewis v. U. S., 38 F. (2d) 406.

In that case this Court, speaking by Mr. Justice Wilbur, again laid down the rule (p. 410), that *"reversal will not result from error unless from the whole record it appears to have been prejudicial"*, citing numerous cases in support of this ruling. In that holding Justice Rudkin and Dietrich concurred.

Again, in the case of

Miller v. U. S., 47 F. (2d) 120,

the Ninth Circuit Court of Appeals had occasion to pass upon a contention that the trial Court had erred in refusing a request for a number of particulars asked for by the defendant regarding certain allegations in the indictment. This Court, in holding that no error had been committed by the trial Court, said:

> *"In the absence of a showing that substantial rights were prejudiced* by the refusal of those portions of the requested bill of particulars which were denied, appellant has no ground for complaint as to the exercise of its discretion by the court below in this regard."

Finally we call attention to the case of

Coplin v. U. S., 88 F. (2d) 652,

decided by this Court in March of this year. The opinion was by Mr. Justice Garrecht, with whom concurred Justices Wilbur and Haney. In this case a judgment of conviction was affirmed. The Court called attention to the fact that notwithstanding the argument advanced by appellant, there had been "no showing of prejudicial error" resulting from the reception of the evidence objected to.

It will have been noted that of all of these cases decided by this Circuit in none of them is there the slightest intimation that prejudice will be presumed from error under any circumstances. On the other hand, the tenor of all of the opinions is to the effect that the burden is on an appellant at all times to show *"substantial error and resulting prejudice",* to quote the phrase employed in the *Little* case (supra), in commenting on the holding of this Court in the *Marron* case (supra).

We shall not take the time to make an exhaustive examination of the holdings of other Circuits. We will take the liberty, however, of quoting from a decision by the Eighth Circuit Court of Appeals in the case of

Furlong v. U. S., 10 F. (2d) 492.

Referring to Section 269 of the Judicial Code, as amended, and its provision that no judgment shall be set aside in any case for error unless "after an examination of the entire record it shall affirmatively

appear that the error complained of has resulted in a miscarriage of justice, the Court said (p. 495):

> "The object of the legislation is to abolish the old rule that when error is shown prejudice will be presumed. It creates a presumption in favor of the judgment, and requires the party seeking a new trial to convince the court upon the entire record that the judgment is wrong. If the judgment is right, the end of the law has been attained, and it ought not to be disturbed."

We submit that no affirmative showing of error, resulting in a miscarriage of justice, appears in the record in the instant case. It is only by indulging in an artificial presumption of error, which presumption does not grow out of, and is not based upon, any inference that may legitimately be drawn from the evidence, that a conclusion of prejudice can be reached.

The above consideration of the presumption of error as necessarily being prejudicial, is all based upon the assumption that the point was properly before this Court for consideration. We submit that such was not the fact. We will not take the time to cite authorities to the effect that a proper exception must be taken before this Court will consider assignments of error. The record in this case, as set out in the opinion, is to the effect that when the foreman of the jury appeared in the judge's chambers and informed the judge that the jury wished to be advised if the confession of one defendant in the case could be considered as evidence against the other, the attorney for appellants, instead of objecting to the request as improper, or suggesting

that all the jury be brought into Court to receive the instruction requested, by clear implication concurred in the propriety of the foreman's action. The first thing that happened after the foreman appeared and explained his mission, was the request of the appellants' attorney to have an instruction that was favorable to his client, given by the Court. It further appears from the record, as quoted in the opinion (p. 4), that the Court refused to give the instruction requested by appellants' counsel, and *"over defendant's exception adhered to the instruction given* to the jury in the course of the trial". By no reasonable construction can this language be regarded as signifying that counsel for appellants excepted to anything other than the Court's refusal to give the instruction that counsel asked for, and to the Court's reiteration of the instruction that he had given during the course of the trial. If there were even any doubt as to the meaning of the language employed by counsel in taking this exception, we submit that in view of the tenor and intent of Section 269 of the Judicial Code with respect to the burden on an appellant to make out a showing that will justify a reversal, this Court cannot reasonably construe the language of counsel for appellants in such a manner as to permit the consideration by this Court of the error complained of on this appeal.

Moreover, even though the exception relied on by appellants were sufficient, we submit that, as pointed out by Mr. Justice Wilbur, there was no assignment of error to the giving of the instruction to the foreman in the absence of the rest of the jury. The assignment

was only to the refusal of the Court to give the particular instruction desired by counsel and to the Court's "adherence" to the instruction given on the subject during the trial.

It has long been the settled rule in this Circuit that, as stated by the Court in *American Surety Co. v. Fisher Warehouse Co.,* 88 F. (2d) 536, 538, "if the assignments are so indefinite that the particular error is not set forth, the assignments will be disregarded". The purpose of requiring assignments and of requiring that they be clear and explicit, is, as was said by this Court in the same case, quoting from a Supreme Court decision "to enable the Court as well as opposing counsel readily to perceive what points are relied on". (Citing numerous cases.)

We have in mind that this Court, under its rule, may in its discretion notice a plain error not assigned. We are not aware of any federal decision that adequately treats the question of what constitutes plain error. A statute involving a similar principle has, however, been construed on numerous occasions by one of our State Courts. Texas has long had a statute upon its books authorizing an Appellate Court to consider errors "either assigned or apparent upon the face of the record".

In the case of *Searcy v. Grant,* 37 S. W. 320, the Supreme Court of Texas had occasion to pass upon this provision of the law. Plaintiff had recovered a judgment which had been reversed by the Court of Civil Appeals. The Supreme Court held that the

Court of Civil Appeals had erred in the action taken by it because the error relied upon had neither been assigned by the appellant, nor was it apparent on the face of the record. Said the Supreme Court, page 322:

> "An error, not assigned, of which the Court of Civil Appeals may take cognizance must be an error of law apparent on the record which *necessarily* affected the result, and it must *plainly appear* from the record that, in the absence of such error, the result might have been different."

Again, in the comparatively recent case of *Texas & P. Ry. Co. v. Lilly,* 23 S. W. (2d) 697, it appears that the Court of Civil Appeals had certified to the Commission of Appeals of Texas the question whether, in the absence of assignments of error filed in the Court below, the Court of Civil Appeals was authorized to take notice of the error complained of. Said the Texas Commission of Appeals in its consideration of the language of the statute authorizing a consideration of apparent errors:

> "One of the first cases in which this statute was considered is Houston Oil Co. v. Kimball, 103 Tex. 94, 122 S. W. 533, 537, where Justice Brown, later Chief Justice, said: 'The language, "apparent upon the face of the record", indicates that it is to be seen upon looking at the face of the record (that is, the assignment itself), the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties. Perhaps the best expression is that *it must be a funda-*

mental error, such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily.'

"The latter part of this quotation is indeed the best expression that has been made or can be made of the matter. As pointed out in the opinion under review, the statute does not mean that any error which can be ascertained by looking into the record, including the evidence, will constitute that error 'apparent upon the face of the record'. This would be to make all errors fundamental errors, for every error may be made to appear by an examination of the entire record. (Italics ours.)

The Supreme Court of Texas, by Chief Justice Cureton, adopted the opinion of the Commission of Appeals.

The reasoning of the Texas Courts should make it apparent that the error complained of by appellants in the instant case is not such plain error as will justify this Court in considering it in the absence of a sufficient assignment.

Even if under ordinary circumstances, the error that is now complained of, had been assigned in proper language, still another reason presents itself why this Court may not consider it. That reason is, as was likewise pointed out by Judge Wilbur, that the error was invited by the defendants in requesting an instruction opposite in effect to the one given by the jury. If the Court had *first* given an unfavorable instruction in response to the request of the foreman, and counsel

for appellants, for purposes of the record, had then requested the instruction which the record shows he did ask for, the situation presented might be analogous to the situation that frequently arises where a witness has been examined in a form that is regarded by opposing counsel as improper. It is generally held that under those circumstances he does not waive the error by cross-examining on the objectionable matter. (See *Fernandez v. Western Fuse Co.,* 34 Cal. App. 420, citing cases in support, and *Jameson v. Tully,* 178 Cal. 380, 384.)

But no such situation presents itself here. It appears from the record that the original request that the instruction asked for by the foreman be given, was the request of appellants' counsel.

Under the circumstances the well-settled rule, as exemplified in the case of *Shields v. U. S.,* 17 Fed. (2d) 66, 69, is applicable. Said the Court in that case:

> "The justified reliance of court on the request of counsel, avoidance of abortive mistrials, and the timely administration of a court's work, based on the verdict of a jury which had evidence to support it, all unite in making the case one where with one breath a court cannot be asked by counsel to take a step in a case, and later be convicted of error because it has complied with such request, for, as is said in 17 Corpus Juris, 373, 374, *'a defendant in a criminal case cannot complain of error which he himself has invited.'* "

There is one other and concluding point that we wish to take up. This Court held in its opinion in the

instant case (p. 6) that "appellants were entitled to be personally present at every stage of the trial". The Court concedes that appellants could have waived that right by voluntarily absenting themselves from the trial, but held that that exception had no application under the circumstances presented. We submit that the fact that a defendant in a criminal case is not personally present at every stage of his trial, is no longer reversible error, even though the defendant may not have voluntarily absented himself. In our opinion this conclusion necessarily follows from the holding of the Supreme Court in the comparatively recent case of *Snyder v. Massachusetts,* 291 U. S. 97. In that case it was urged that the defendant had been improperly convicted of the charge of murder that had been made against him because the jurors had been taken to visit the scene of the crime accompanied by the judge, the counsel for both parties and the Court stenographer, but that the defendant's request to be permitted to attend the view was denied. The original orthodox rule on this subject was expressed in the minority opinion of Mr. Justice Roberts. Said Mr. Justice Roberts (p. 128):

> "Our traditions, the Bills of Rights of our federal and state constitutions, state legislation and the decisions of the courts of the nation and the states, unite in testimony that the privilege of the accused to be present throughout his trial is of the very essence of due process. The trial as respects the prisoner's right of presence in the constitutional sense, does not include the formal procedure of indictment or preliminary steps antecedent to the hearing on the merits, or stages

> of the litigation after the rendition of the verdict, but does comprehend the inquiry by the ordained trier of fact from beginning to end."
>
> "Accordingly", said the learned Justice, "the Courts have uniformly and invariably held that the Sixth Amendment, as respects Federal trials, and the analogous declarations of right of the state constitutions touching trials in state courts, secure to the accused the privilege of presence at every stage of his trial."

He pointed out (p. 131), that although it had been urged that the prisoner's privilege of presence was for no other purpose than to safeguard his opportunity to cross-examine adverse witnesses, it in fact went deeper and secured his right to be present at every stage of the trial. Although he conceded that there was a lack of unanimity in the authorities as to whether or not a view of the premises formed a part of the trial, he contended that the weight of authority was to the effect that it did constitute a part of the trial, and for that reason a defendant who so desired was entitled to be present. He concluded that the defendant had been deprived of a constitutional right in not being permitted to be present at the view and that, therefore, the judgment should be reversed. It is apparent that this Court has based its opinion and holding in the instant case, in so far as the point under consideration is concerned, upon the same line of reasoning that was advanced by Mr. Justice Roberts and his associates in the *Snyder* case.

Notwithstanding the reasoning of Justice Roberts with whom concurred Justices Sutherland, Brandeis

and Butler, the majority of the Court in the *Snyder* case held otherwise. The majority, speaking by Mr. Justice Cardozo held that the fact that the defendant had not been permitted to attend at the view did not constitute reversible error. The majority opinion conceded (p. 105) for purposes of the case that in a prosecution for a felony the defendant has the privilege under the 14th Amendment, to be present in his own person *"whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge"*. As pointed out by the Court, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the Federal Courts, and in prosecutions in the State Courts is assured very often by the Constitutions of the States and, possibly, by the 14th Amendment as well. The Court also intimated that the same right might exist in connection with the examination of jurors and the summing up of counsel, because it would be in defendant's power, if present, "to give advice or suggestion or even to supersede his lawyers altogether and to conduct the trial himself". As the Court further pointed out (p. 106):

> "Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. What has been said, if not decided, is distinctly to the contrary."

At a bare inspection of premises with nothing more, continues the opinion, there is nothing that a defend-

ant could do if he were there and almost nothing that he could gain.

The Court quotes (p. 112) an early California decision, *People v. Bonney,* 19 Cal. 426, 446, to the effect that:

> "We do not see what good the presence of the prisoner would do as he could neither ask nor answer questions nor in any way interfere with the acts, observations, or conclusions of the Jury."

The Court further on in its opinion (p. 114) points out that a defendant in a criminal case must be present during a trial when evidence is offered because the opportunity must be his to advise with his counsel and cross-examine his accusers.

With reference to the problem which has troubled the Courts as to whether a view is part of the trial or is merely to enable the jury to better understand the testimony introduced, the Court succinctly stated (p. 121) that whichever view is taken of a view of premises, "its inevitable effect is that of evidence no matter what label the judge may choose to give it". The majority opinion concluded with this sentence, to which we respectfully call this Court's attention:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if *gossamer possibilities of prejudice* to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We submit that the logic and reasoning of the Court in the *Snyder* case, conclusively disposes of the hold-

ing of this Court in the instant case to the effect that a defendant in a criminal case who is charged with a felony is in all cases "entitled to be personally present at every stage of the trial". It is obvious from the language used by the Court in the majority opinion that whether or not a defendant is entitled to be present at a certain stage of the trial depends upon whether or not his presence can be of any advantage or assistance to him. We submit that the presence of a defendant at the time a Court is giving his instructions, and particularly at a time when the Court is merely repeating an isolated instruction upon a point upon which he has already instructed the jury, could be of no assistance to him. It is obvious that he could make no pertinent suggestion to his counsel that could materially affect the situation.

If our conclusion is sound, as we believe it to be, it must necessarily follow that the holding of the majority of the Court in the instant case, that a defendant is entitled to be personally present at every stage of the trial is not in accord with the position taken by the Supreme Court in the *Snyder* case.

We cannot better conclude this petition, in our opinion, than by quoting the footnote appended to its opinion by the Court in the *Little* case (supra), in which footnote the Court quotes from the *Snyder* case as follows:

> "In *Snyder v. Massachusetts,* 291 U.S. 97, 113, 54 S.Ct. 330, 335, 78 L. Ed. 674, 90 A.L.R. 575, after finding that no prejudice resulted from the defendant's absence when the scene of the crime was viewed, the Supreme Court held that *'the*

*least a defendant must do * * * is to show that* in the particular case in which the practice is exposed to challenge, *there is a reasonable possibility that injustice has been done.'* "

We submit that in the instant case the burden was upon the appellants to prove that there was a "reasonable possibility that injustice has been done" to them. We further submit that they have failed to show affirmatively that there is such a reasonable possibility, or to show anything more than, to use the phrase of Mr. Justice Cardozo, "a gossamer possibility", and that this Court erred in reversing the judgment and overthrowing the verdict that was rendered in the lower Court. We respectfully ask that a rehearing in the case be granted.

Dated, San Francisco, California,
August 25, 1937.

Respectfully submitted,

INGRAM M. STAINBACK,
United States Attorney, District of Hawaii,
WILLSON C. MOORE,
Assistant United States Attorney, District of Hawaii,
FRANK J. HENNESSY,
United States Attorney, Northern District of California,
ROBERT L. MCWILLIAMS,
Assistant United States Attorney, Northern District of California,
San Francisco, California,
Attorneys for Appellee and Petitioner.

No. 8363

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLIVE LEMM, Individually, and as Administratrix of the Estate of CHARLES LEMM, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK and CARR and GREGORY, a Co-partnership,

Kennedy

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

FILED

APR - 1 1937

PAUL P. O'BRIEN,
CLERK

Parker Printing Company, 545 Sansome Street, San Francisco

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Parker Printing Company, 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Attorneys for Appellant:

C. H. SOOY, Esq.,
C. D. SOOY, Esq.,
Mills Bldg.,
San Francisco, California.

GLENN D. NEWTON, Esq.,
Redding, Calif.

Attorneys for Appellees:

CARR & KENNEDY, Esqs.,
Redding, Calif.

In the District Court of the United States
for the Northern District of California.

No. 6935

In the Matter of OLIVE LEMM, individually and OLIVE LEMM, as Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, deceased, Debtor.

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75, AS AMENDED, OF THE BANKRUPTCY ACT.

The petition of Olive Lemm, individually, and Olive Lemm, as Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, Deceased, of Bella Vista, in the County of Shasta, and district and state of California, respectfully represents:

That your petitioner is the duly appointed, qualified and acting Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, Deceased, and that she is the widow of said deceased. That all the property hereinafter described and set forth was and is the property of your petitioner and said deceased.

That she is personally bona fide, engaged primarily in farming operations as follows: Raising and selling of livestock and general farming; that such farming operations occur in the County of Shasta within said judicial district; that she is insolvent or unable to meet her debts as they mature; and that she desires to effect a composition or extension of time to pay her debts under section 75, as amended, of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all her debts, and (so far as possible to ascertain) the names and places of residence of her creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto anexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory [1*] of all her property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

Wherefore, your petitioner prays that her petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

OLIVE LEMM

Petitioner.

GLENN D. NEWTON

Attorney for Petitioner. [2]

United States of America,
District of Northern California—ss.

I, Olive Lemm, individually, and Olive Lemm, as Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

OLIVE LEMM

Subscribed and sworn to before me this 12th day of June, 1936.

[Seal] GLENN D. NEWTON

Notary Public in and for the County of Shasta, State of California.

My commission expires December 15th, 1937. [3]

Schedule A.

LIABILITIES

1.	Promissory note made, executed and delivered by petitioner and said Chas. L. Lemm, deceased, as husband and wife, on July 13th, 1939, to Redding Savings Bank, secured by Deed of Trust of even date. Amount due on principal of said note	$11,500.00
	Accrued interest on said note to Feb. 1, 1936, estimated in the sum of	3,119.88
2.	Promissory note made, executed and delivered by petitioner and said Chas. L. Lemm, Deceased, as husband and wife, on February 10th, 1931, to Redding Savings Bank, a banking corporation, Redding, California, secured by Deed of Trust of even date. Amount due on principal of said note	3,500.00
	Accrued interest on said note to Feb. 1st, 1936, estimated in the sum of	1,041.09
3.	Claims filed against Estate of said Charles L. Lemm, Deceased, as follows:	
	Promissory note made, executed and delivered by petitioner and said deceased, as husband and wife, to the Northern California National Bank, Redding, California, dated September 26th, 1932, in the sum of One Thousand Dollars.	

Amount due on principal, together with interest accrued thereon	1,231.34
Open Book Account with Pernau-Walsh Printing Company, San Francisco, Calif. for printing brief in the sum of	100.00
Open Book Account with Carr & Kennedy, Attorneys [4] at Law, Redding, California, for services in Cow Creek Water case and litigation with Stillwater Land and Cattle Company, in the sum of	760.37
Open Book Account with the Union Oil Company of California, Redding, California, for gasoline, etc. in the sum of	24.30
Costs and expenses of administration in the Estate of Charles L. Lemm, Deceased, in the sum of	1,485.25
(Notify Jesse W. Carter, Attorney at Law, Redding, California, attorney for said petitioner, as Administratrix of said estate for particular items of said statement)	
Attorney's fee of Jesse W. Carter, Attorney at Law, Redding, California, as attorney for said Estate, estimated in the sum of	1,200.00
Total Liabilities	$23,962.23

[5]

Schedule B

ASSETS

REAL PROPERTY

Cow Creek Ranch:	
The SE¼ and S½ of SW¼ of Section 33, Township 33, North, Range 3 West consisting of 240 acres; SW¼ of Section 36, Township 33 North, Range 3 West consisting of 160 acres; Township 32 North, Range 3 West, M.D.M. Frac. N½ of NW¼ of Section 2, save and except that certain portion thereof conveyed by Henry N. Wilkinson in his lif*t* time to William Redeker and Louise Redicker, his wife, in a certain deed of Conveyance dated March 21, 1892, and recorded May 20, 1892 in Vol. 32 of Deeds at page 140, Records of Shasta County; Lot 2 of NE¼, Sec. 2, Tp. 32 N. R. 3 W., and valuable water rights, all of the value of	6,000.00
Improvements of the value of	500.00
Stevenson Place:	
SE¼ and SE¼ of NE¼ of Section 33, and SW¼ of SW¼ of Section 34, containing 240 acres, also frac. W½ of NW¼ of Sec. 6, Tp. 31 R. 3 W., of the value of	1,800.00
Improvements of the value of	300.00

Smith Place on Stillwater:
Township 32 North, Range 4 West, S½ of NE¼; E½ of SE¼ of NW¼; SE¼ and E½ of E½ of SW¼ of Section 15, containing 300 acres; also NW¼ of NE¼ of Section 22, containing 40 acres, of the probable value of ..... set aside as a Probate Homestead by the Superior Court in and for the County of Shasta. [6]

40 acres North of Road:
W½ of Lot 2 of NE¼ of Section 3, containing 41 acres, of the probable value of 120.00

Range Land:
Township 33 North, Range 3 West, S½ of NE¼ and SE¼ of Section 20, containing 240 acres, of the probable value of 720.00

Wilburn Place:
An undivided 2/3 interest in and to the E½ of NE¼ of Sec. 21 and N½ of SW¼ and NW¼ of Sec. 22, all in Tp. 32 N., R. 4 W., M.D.M. containing 320 acres, of the probable value of 1,500.00

10,940.00

PERSONAL PROPERTY

60 head of hogs, approximate value	250.00
2 horses, approximate value	100.00

Farming machinery and equipment of the approximate value	500.00
40 head of cattle of the approximate value	1200.00
1 automobile of approximate value	200.00
One Liberty Bond, value of	50.00
Cash	2156.65
Damages, prospective, for right of way through Stillwater property	1800.00
Damages, prospective, for right of way through Cow Creek Ranch.....	
Total Assets	17,646.65

[Endorsed]: Filed June 22, 1936. [7]

[Title of Court and Cause.] No. 6935

ORDER APPROVING DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT.

At San Francisco, in said District, on the 23rd day of June, A. D. 1936, before the Honorable MICHAEL J. ROCHE, Judge of said Court, the petition of OLIVE LEMM, etc., praying that she be afforded an opportunity to effect a composition or an extension of time to pay her debts under Section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

Dated: June 23rd, 1936.

MICHAEL J. ROCHE
Judge,
United States District Court.

[Endorsed]: Filed Jun 23 1936. [8]

[Title of Court and Cause.] No. 6935

CREDITORS' MOTION FOR DISMISSAL OF PETITION AND PROCEEDINGS UNDER SECTION 75 (A-R)

Come now the Northern California National Bank (in liquidation), The Redding Savings Bank and Carr & Kennedy, a co-partnership, creditors of the above named debtor, and move the court that an order be made herein dismissing the petition filed by said debtor with John A. Spann, Conciliation Commissioner, on the 18th day of June, 1936, under

the provisions of Section 75 (A-R), as amended, of the Bankruptcy Act, upon the following grounds:

1. That said petition was filed by said debtor without authority of law;

2. That a petition and proceedings under Section 75 (A-R), as amended, of the Bankruptcy Act were heretofore filed and taken by said debtor, which proceedings were numbered 6575 in the files of the above entitled court, and upon motion of said debtor, after failure to effect a composition or extension of time under Section 75, an order was made in said proceedings by the above entitled court, Hon. Michael J. Roche, District Judge dismissing said petition and proceedings under section 75 (A-R) on the ground that no composition or extension had been reached; that said debtor, prior to said order dismissing said petition, also filed in said [9] proceedings numbered 6575, a petition to be adjudged a bankrupt under sub-section (s) of Section 75, as amended, of the Bankruptcy Act, and thereafter an order was made by the above entitled court, Hon. Michael J. Roche, District Judge granting the motion of the above named creditors for the dismissal of said proceedings under Section 75(s) of the Bankruptcy Act, as amended; and the dismissal of said prior proceedings taken by said debtor under Section 75, as amended, of the Bankruptcy Act constitute a bar to the petition filed herein by said debtor;

3. That by reason of the dismissal of said prior proceedings taken by said debtor under Section 75 of the Bankruptcy Act, as amended, the court herein

is without jurisdiction of the petition filed herein by said debtor on the 18th day of June, 1936;

4. That the petition filed herein by said debtor under Section 75 (A-R) was not filed in good faith, and was filed for the purpose of delaying and hindering her creditors;

5. That the debtor's petition as filed herein, is insufficient in law, and does not state or contain facts sufficient to constitute a petition by said debtor under Section 75 (A-R) of the Bankruptcy Act;

Said motion is based upon the debtor's petition herein, all the files and records of this court in the proceedings numbered 6575, heretofore taken by said debtor under Section 75, as amended of the Bankruptcy Act, to which reference is hereby made, and the affidavit of Laurence J. Kennedy, served and filed herewith.

Dated: July 22, 1936.

CARR & KENNEDY

Attorneys for the Northern California National Bank, in liquidation, The Redding Saving Savings Bank and Carr & Kennedy. [10]

Service and receipt of a copy of the foregoing Creditors' Motion for Dismissal of Petition and Proceedings under Section 75 (A-R) is hereby admitted this 24th day of July, 1936.

GLENN D. NEWTON

Attorney for Debtor [11]

State of California
County of Shasta—ss.

LAURENCE J. KENNEDY, being first duly sworn, deposes and says:

That he is one of the law firm of Carr & Kennedy, of Redding, California, appearing herein as attorneys for the Northern California National Bank, in liquidation, The Redding Savings Bank and said Carr & Kennedy, a co-partnership;

That affiant is personally familiar with the matters and the court proceedings herein mentioned;

That the above named debtor, Olive Lemm, individually, and Olive Lemm as administratrix of the estate of Charles L. Lemm, deceased, is the same person who previously filed a petition in the above entitled court in proceedings under Section 75 of the Bankruptcy Act, numbered 6575 in the files of said court, which petition was referred to John A. Spann, Conciliation Commissioner of the County of Shasta, State of California;

That after hearings and proceedings before said Conciliation Commissioner in said proceedings filed by said debtor under Section 75 of the Bankruptcy Act, No. 6575, said debtor filed a Motion for Dismissal, in the words and figures following, to-wit:

[Title of Court and Cause.]

> "Now comes Olive Lemm, individually, and Olive Lemm as Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, deceased, the Debtor in the above en-

titled action, and moves the court that an order be made dismissing the above entitled proceedings for a composition or extension.

Said motion is made upon the ground that the Debtor has failed to obtain the acceptance of majority in number and amount of all creditors whose claims would have been affected by a composition or extension proposal.

Dated: February 14th, 1936.

GLENN D. NEWTON

Attorneys for Debtor and Petitioner"

That upon filing said Motion for Dismissal said debtor filed a petition to be adjudged a bankrupt in accordance with sub-section (s) of Section 75, as amended, of the Bankruptcy Act, which said petition is on file in this court in said proceeding No. 6575, to [12] which reference is hereby made;

That on the 15th day of June, 1936, in the above entitled court an order was made by Hon. Michael J. Roche, District Judge, dismissing the proceedings taken by said debtor under Section 75 (A-R), in accordance with her Motion for Dismissal, above set forth; and thereupon the court made an order dismissing the petition filed by said debtor under Section 75(s) in accordance with motions heretofore served and filed by the creditors hereinabove named, to which motions, on file in said proceedings No. 6575, reference is hereby made for a statement of the grounds of said motions:

The proceedings in the above entitled court, before Hon. Michael J. Roche, District Judge, on the

15th day of June, 1936, are shown by the minutes of the court, as follows, to-wit:

"At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the court room thereof, in the City of Sacramento, on Monday, the 15th day of June, in the year of our Lord one thousand nine hundred and 36.

PRESENT: the HONORABLE MICHAEL J. ROCHE, District Judge.

No. 6575

In the Matter of

OLIVE LEMM, individually, etc.

Debtor

The motions of The Northern California National Bank, Carr & Kennedy, a copartnership, and of The Redding Savings Bank, Creditors, to dismiss the Petition of the Debtor to be adjudged a Bankrupt in accordance with Subsection "S" of Section 75 as amended, of the Bankruptcy Act, came on to be heard. L. J. Kennedy, Esq., appearing as attorney for said creditors and in support of said motions and Glenn D. Newton, Esq., appearing as attorney for the debtor. On motion of Mr. Newton, and good cause appearing therefor, it is Ordered that the Order heretofore signed as of May 28, 1936 and filed on June 1, 1936, be and the same is hereby vacated and set aside, and it is further ordered that the motion to dismiss the proceedings herein under Section 75 (A-R) be and the same is hereby granted on the ground that

no composition or extension has been reached, and that the creditors be allowed an exception to the ruling of the Court. The motions to dismiss the petition of the Debtor, under Section 75(s) was thereupon argued by the Attorneys, and the same being submitted and fully considered, it is Ordered that the motions of the Northern California National Bank; of Carr & Kennedy, a co-partnership, and of The Redding Savings Bank, Creditors, be and the same are each hereby granted and that the proceedings herein under Section 75(s) be and the same are hereby dismissed." [13]

That said debtor, after filing the foregoing proceedings under Section 75, as amended, of the Bankruptcy Act, No. 6575, and prior to said decision and order of Hon. Michael J. Roche, District Judge, entered on the 15th day of June, 1936, out of the cash listed in the schedule of her assets, filed with said original petition under Section 75, paid the debts due and owing to certain creditors of said debtor whose claims were listed as liabilities in Schedule A filed with said original petition under Section 75, and said creditors thereby received a preference over the creditors represented herein by affiant;

That the value of the assets of said debtor, as affiant is informed and believes, is greatly in excess of the value shown by Schedule B, attached to the petition herein; that the total value of the debtor's assets, according to a fair and reasonable value of same, exceeds the total amount of liabilities; and af-

fiant is informed and believes, and upon such information and belief hereby deposes that the petition of the debtor herein was filed for the purpose of delaying and hindering the creditors named in the foregoing motion, and that said petition was not filed in good faith;

Affiant further deposes and says that probate proceedings are now, and at the time of the filing of debtor's petition herein were, pending in the Superior Court of the State of California, in and for the County of Shasta for the administration of the estate of Charles L. Lemm, deceased, of which the debtor is the administratrix, and the filing of said petition herein is in disregard of the jurisdiction and the authority of the probate court of California in the matter of the administration of the estate of said decedent.

LAURENCE J. KENNEDY

Subscribed and sworn to before me this 24th day of July, 1936.

[Seal] MABEL LOWDON MOORES

Notary Public in and for the County of Shasta, State of California.

[Endorsed]: Filed July 25, 1936. [14]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday the 22nd day of Sept., in the year of our Lord one thousand nine hundred and 36.

PRESENT: The Honorable MICHAEL J. ROCHE, District Judge.

No. 6935

In the Matter of

OLIVE LEMM, etc.,

Debtor.

The Motion of the Northern California National Bank (in liquidation), The Redding Savings Bank, and Carr and Kennedy, a copartnership, for dismissal of petition of proceedings under Section 75(A-R), heretofore heard and submitted, being now fully considered, it is Ordered that said motion be and the same is hereby granted and that the proceedings herein be and the same are hereby dismissed with prejudice. [15]

[Title of Court and Cause.] No. 6575

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75, AS AMENDED, OF THE BANKRUPTCY ACT.

The petition of Olive Lemm, individually, and Olive Lemm, as Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, Deceased, of Bella Vista, in the County of Shasta, and district and state of California, respectfully represents:

That she is personally bona fide, engaged primarily in farming operations as follows: Raising and selling of livestock and general farming; that such farming operations occur in the County of Shasta within said judicial district; that she is in-

solvent or unable to meet her debts as they mature; and that she desires to effect a composition or extension of time to pay her debts under Section 75, as amended, of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all her debts, and (so far as possible to ascertain) the names and places of residence of her creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all her property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

That your petitioner is the duly appointed, qualified and acting Administratrix of the Estate of Charles L. Lemm, sometimes known as Chas. L. Lemm, Deceased, and that she is the [16] widow of said deceased. That all the property hereinafter described and set forth was and is the property of your petitioner and said deceased.

Wherefore, your petitioner prays that her petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

OLIVE LEMM

Petitioner.

GLENN D. NEWTON

Attorney for Petitioner. [17]

Schedule A.

LIABILITIES

1.	Promissory note made, executed and delivered by petitioner and said Chas. L. Lemm, deceased, as husband and wife, on July 13th, 1929, to Redding Savings Bank, secured by Deed of Trust of even date. Amount due on principal of said note	$11,500.00
	Accrued interest on said note to date, estimated in the sum of	2,500.00
2.	Promissory note made, executed and delivered by petitioner and said Chas. L. Lemm, Deceased, as husband and wife, on February 10th, 1931, to Redding Savings Bank, a banking corporation, Redding, California, secured by Deed of Trust of even date. Amount due on principal of said note	3,500.00
	Accrued interest on said note to date, estimated in the sum of	500.00
3.	Claims filed against Estate of said Charles L. Lemm, Deceased, as follows:	
	Promissory note made, executed and delivered by petitioner and said deceased, as husband and wife, to the Northern California National Bank, Redding, California, dated September 26th, 1932, in the sum of One Thousand Dollars.	

Amount due on principal, together with interest accrued thereon	1,032.48
Open Book account with McCormick-Saeltzer Company, at Redding, California, in the sum of	251.86
Open Book account with Dr. Ferdinand Stabel, Redding, California, for medical services in the sum of	455.00
Open Book account with McDonald & Scott, Redding, California, for funeral expenses in the sum of	273.50
Open Book Account with Pernau-Walsh Printing Company, San Francisco, Calif. for printing brief in the sum of	100.00
Open Book Account with Carr & Kennedy, Attorneys at law, Redding, California, for services in Cow Creek Water case and litigation with Stillwater Land and Cattle Company, in the sum of	760.37
Open Book Account with the Union Oil Company of California, Redding, California, for gasoline, etc. in the sum of	24.30
Costs and expenses of administration in the Estate of Charles L. Lemm, Deceased, in the sum of	1,485.25

(Notify Jesse W. Carter, Attorney at Law, Redding, California, attorney for said petitioner, as Administratrix of said estate for particular items of said statement)

Attorney's fee of Jesse W. Carter, Attorney at Law, Redding, California, as attorney for said Estate, estimated in the sum of 1,200.00

Total Liabilities $23,582.76

[19]

Schedule B

INVENTORY OF ASSETS

The SE¼ of Section 35, Township 33, North, Range 3 West consisting of 240 acres; SW¼ of Section 36, Township 33 North, Range 3 West consisting of 160 acres; 5,000.00

Township 32 North, Range 3 West, M.D.M. Frac. N½ of NW¼ of Section 2, save and except that certain portion thereof conveyed by Henry N. Wilkinson in his life time to William Redeker and Louise Rediker, his wife, in a certain deed of Conveyance dated Mar. 21, 1892, and recorded May 20, 1892 in Vol. 32 of Deeds at page 140, Records of Shasta County of the estimated value of (68 acres) 3,740.00

Improvements of the value of	1,500.00
Township 32 North, Range 4 West, S½ of NE¼; E½ of SE¼ of NW¼; SE¼ and E½ of E½ of SW¼ of Section 15, containing 300 acres; also NW¼ of NE¼ of Section 22, containing 40 acres, of the probable value of	2,000.00
Township 32 North, Range 3 West Lot 2 of NE¼ of Section 2, containing 83.22 acres, of the probable value of	415.00
W½ of Lot 2 of NE¼ of Section 3, containing 41 acres, of the probable value of	120.00
Township 33 North, Range 3 West, S½ of NE¼ and SE¼ of Section 20, containing 240 acres, of the probable value of	720.00
SE¼ and SE¼ of NE¼ of Section 33, and SW¼ of SW¼ of Section 34, containing 240 acres, of the probable value of	3,000.00
Township 31 North, Range 3 West: Frac. W½ of NW¼ of Section 6 containing 78 acres, of the probable value of	234.00

PERSONAL PROPERTY

60 head of hogs, of the approximate value of	250.00
2 horses of the approximate value of	100.00
Farming machinery and equipment of the approximate value of	5000.00

[20]

40 head of cattle of the approximate value of	1200.00
1 automobile of the probable value of	200.00
One Liberty Bond, of the value of	50.00
Cash	5000.00
Total Assets	28,529.00

[21]

United States of America,
District of Northern California—ss.

I, OLIVE LEMM, individually, and OLIVE LEMM, as Administratrix of the Estate of CHARLES L. LEMM, sometimes known as CHAS. L. LEMM, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

OLIVE LEMM

Subscribed and sworn to before me this 22nd day of November, 1935.

[Seal] GLENN D. NEWTON
Notary Public in and for the County of Shasta, State of California.

My commission expires December 15th, 1937.

[Endorsed]: Filed July 25, 1936. [22]

[Title of Court and Cause.] No. 6575

ORDER APPROVING DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT.

At San Francisco, in said District, on the 25th day of November, A. D. 1935, before the Honorable A. F. St. Sure, Judge of said Court, the petition of Olive Lemm, individually, and Olive Lemm, as Administratrix of the Estate of Charles L. Lemm, Deceased, praying that she be afforded an oppor-

tunity to effect a composition or an extension of time to pay her debts under Section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said Section.

Dated: November 25th, 1935.

A. F. ST. SURE
Judge,
United States District Court

[Endorsed]: Filed Nov. 25, 1935. [23]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Walter B. Maling, Clerk of the United States District Court for the Northern District of California:

You are hereby informed that debtor above named has heretofore petitioned for an appeal from an order of the United States District Court made and entered on the 22nd day of September, 1936, dismissing *per* petition.

Debtor's petition for appeal having been granted, you are hereby requested to prepare and certify a transcript of the record which will include the following named papers necessary to a determination of the cause in the Circuit Court of Appeals:

1. Debtor's Petition and Schedules in Proceedings under Section 75, as amended, of the Bankruptcy Act, filed June 18, 1936, with Conciliation Commissioner. (No. 6935)

2. Order approving Debtor's petition, filed June 23, 1936.

3. Creditor's Motion for Dismissal of Petition and Proceedings under Section 75 (A-R), dated July 22, 1936, No. 6935.

4. Affidavit of Laurence J. Kennedy in Support of Creditor's Motion, dated July 24th, 1936, No. 6935.

5. Petitioner's Proposal of Compromise and Extension to Creditors, dated August 31st, 1936.

6. Petitioner's Memorandum of Points and Authorities in Opposition to Motion for Dismissal, undated.

7. Order Dismissing Proceedings, dated September 22, 1936.

Prior Proceeding No. 6575.

8. Debtor's Petition and Schedules in Proceedings under Section 75, as amended, of the Bankruptcy Act, filed November 22, 1935. [33]

9. Order approving Debtor's Petition, dated November 25th, 1935.

Dated: November 12, 1936.

C. H. SOOY
C. D. SOOY
GLENN D. NEWTON
Attorneys for Debtor.

Service by receipt of copy of above Praecipe for Transcript of Record is admitted this 9th day of December, 1936.

CARR & KENNEDY

[Endorsed]: Filed Dec. 18, 1936. [34]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 34 pages, numbered from 1 to 34, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Olive Lemm, etc., debtor No. 6935 and also in the case of Olive Lemm, etc. debtor No. 6575, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Six and 55/100 ($6.55) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Also attached is a paper in No. 6575 entitled "Petitioner's Proposal of compromise and extension to creditors", the original of which is not of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of January, A. D. 1937.

[Seal] WALTER B. MALING,

Clerk,

By F. M. LAMPERT

Deputy Clerk. [35]

[Title of Court and Cause.] No. 6575

PETITIONER'S PROPOSAL OF COMPROMISE AND EXTENSION TO CREDITORS

Comes now OLIVE LEMM, Petitioner, in the above-entitled matter and makes the following proposal of the compromise and extension in the above-entitled matter.

I.

PROPOSAL TO SECURED CREDITORS

To the secured creditors of petitioner and of the Estate of Charles L. Lemm, deceased, namely, The Redding Savings Bank, a banking corporation, petitioner offers to pay in full liquidation of the said obligations or liens evidenced by two promissory notes secured by deeds of trust in the sums of $11,500 and $3,500, a sum commensurate to the fair and reasonable market value of the property described in the deeds of trust securing said obligations. That said petitioner submits the proposal that the fair and reasonable market value of said property be determined by three appraisers, one of which appraisers shall be chosen by the duly authorized officer or officers of said Redding Savings Bank, a banking corporation, one shall be chosen by your petitioner, and one shall be chosen by John A. Spann, Conciliation Commissioner of the County of Shasta, State of California; that petitioner be given an extension of time for a period of three years from the date of the acceptance of said extension proposed in which to pay said amount determined in the manner aforesaid to be the fair and reason-

able market value of said property; that petitioner offers to pay interest in the future and during said period of extension on said amount as determined at the [36] rate of 5% per annum payable annually; that petitioner further offers to pay during said period of extension in consideration that she retains possession of said property an annual rental on said property the amount and kind of such rental to be the usual, customary rental, based upon the rental value, net income, and earning capacity of the property, and the amount of which rental is to be determined by the same appraisers chosen to determine the value of the property described in said deeds of trust.

Petitioner further proposes that the management and supervision of said property shall be subjected to the scrutiny of John A. Spann, Conciliation Commissioner of said Shasta County and that said rental as determined in the manner aforesaid shall be paid to said John A. Spann to be used by him first for the payment of taxes and upkeep of the property, and the remainder to be paid on said obligations.

Petitioner further proposes to apply towards the liquidation of said obligations all sums after deducting attorney's fees and expenses that may be received by her from the State of California in settlement of the property taken and condemned for a right of way through the premises described in said deeds of trusts.

At the end of said three year extension period, petitioner agrees to pay the balance due on the

amount of the appraisal of said property as determined in the manner aforesaid. In the event that petitioner is unable to pay said balance at the end of said three year period, petitioner agrees to relinquish and convey all her right, title and interest and all the right, title and interest of the Estate of Charles Lemm, deceased, in and to the property described in said deeds of trust to said secured creditor, or to permit the foreclosure sale of said property, on the condition that in either event, said Redding Savings Bank agrees not to take a deficiency judgment.

Petitioner further proposes to put said property described in said deeds of trust on a production basis that will be most consis- [37] tent with the protection of the rights of said creditors and the petitioner's ability to pay with a view to the financial rehabilitation of herself and said Estate of Charles Lemm, deceased.

Petitioner further proposes, in addition to the foregoing, to reimburse said secured creditor for all taxes which have been paid by it on the premises described in said deeds of trust.

Petitioner further proposes to use her best efforts to liquidate the other assets of herself and said estate on a basis that will be consistent with the protection of the rights of said Redding Savings Bank, with a view to the financial rehabilitation of herself and said estate and the liquidation of said obligations.

II.

PROPOSAL TO UNSECURED CREDITORS

To the unsecured creditors of petitioner and the

Estate of Charles Lemm, deceased, petitioner offers to pay in cash, in consideration of full liquidation or settlement of all claims of the unsecured creditors, a sum equal to 66.67 of the face amount of each of said obligations.

Dated, at Redding, California, this 31st day of August, 1936.

OLIVE LEMM [38]

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

No. 8363

In the Matter of OLIVE LEMM, individually, and OLIVE LEMM, as Administratrix of the Estate of CHARLES L. LEMM, Deceased.

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable, the Judges of the Circuit Court of Appeals for the Ninth Circuit. Your Petitioner, OLIVE LEMM, individually, and Administratrix of the Estate of Charles L. Lemm, deceased, respectfully represents:

I.

That she resides at Bella Vista, in the County of Shasta, in the Northern Judicial District of the State of California.

II.

That heretofore and on the 18th day of June, 1936, your Petitioner filed her petition for a compo-

sition or extension agreement under Section 75 A to R of the Bankruptcy Act of the United States in the United States District Court in and for the Northern District of California.

III.

That on the 22d day of September, 1936, an order was made by the United States District Court for said District dismissing Petitioner's proceedings under Section 75 A to R of the Bankruptcy Act, a copy of which order is attached to this Petition marked "Exhibit A" and made a part hereof by reference.

IV.

That your Petitioner feels aggrieved by said Order of Dismissal entered in said proceedings in bankruptcy and does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignment of Errors filed herewith and Petitioner prays that her appeal be allowed; that citation be issued as provided by law to the Northern California National Bank, the Redding Savings Bank and Carr & Kennedy, co-partnership, creditors of Petitioner.

V.

Your Petitioner further prays that a transcript of the record proceedings and documents upon which said order was based duly authenticated, be sent to the United States Circuit Court of Appeals for the *Northern* Circuit, under the rules of said court in such cases made and provided and your

Petitioner further prays that the proper order be made relating to the Security to be required of it.

C. H. SOOY
C. D. SOOY
GLENN D. NEWTON
Attorneys for Petitioner.

Northern District of California
City and County of San Francisco—ss.

C. D. SOOY being first duly sworn deposes and says: that he is one of the attorneys for OLIVE LEMM, Petitioner, that as such attorney he is fully informed as to the facts stated in the foregoing Petition; that he has read the same and the facts therein stated are true save as to the matters therein stated on information or belief and as to those matters he believes them to be true; that he makes this verification on behalf of Petitioner because she is not available to make the same.

C. D. SOOY

Subscribed and sworn to before me this 20th day of October, 1936.

[Notary Seal] DOROTHY H. McLENNAN
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday the 22nd day

of Sept., in the year of our Lord one thousand nine hundred and 36.

PRESENT: The Honorable MICHAEL J. ROCHE, District Judge.

[Title of Cause.]

The Motion of the Northern California National Bank (in liquidation), The Redding Savings Bank, and Carr and Kennedy, a co-partnership, for dismissal of petition of proceedings under Section 75 (A-R), heretofore heard and submitted, being now fully considered, it is Ordered that said motion be and the same is hereby granted and that the proceedings herein be and the same are hereby dismissed with prejudice.

[Endorsed]: Petition for Appeal filed Oct. 21, 1935. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now OLIVE LEMM, Petitioner herein, and makes the following assignment of errors in support of her Petition for Allowance of Appeal herein filed.

1. That the Order of the United States District Court dismissing Petitioner's proceedings under Section 75 (a to r) of the Bankruptcy Act was not justified by law or by the facts of this case.

2. That the District Court announced neither reasons of fact nor rules of law as a basis for its order.

3. That no ground for an order of dismissal either in law or fact was laid by the Petitioner's creditors in their motion, affidavits or at the hearing before the Court.

In view of the fact that the United States District Court did not set forth the reasons for its decision Petitioner refers to creditors' written motion for an order of dismissal as supplying the only possible basis for an order of dismissal.

4. Petitioner assigns as error the ruling that debtor's Petition was filed without authority of law.

5. Creditors' motion states that a dismissal of proceedings under Section 75s as amended (new Frazier-Lemke Act) constitutes a bar to the proceedings under Section 75 (a to r). Petitioner assigns as error the order of dismissal made upon this ground.

6. Creditors' motion states that the United States District Court has no jurisdiction of proceedings filed under Section 75 (a to r) for a composition or extension where prior proceedings in which debtor was adjudicated a bankrupt under 75s were dismissed. This reason for the order of dismissal being in fact the same as the next preceding alleged rule and being equally unsound is also assigned as error.

7. Creditors contended that debtor's petition under Section 75 (a to r) was not filed in good faith and was filed for the purpose of delayng and hindering her creditors.

On this disputed question of fact the United States District Court held in favor of Petitioner and announced in open court that debtor's action was meritorious and that she was entitled to relief.

8. Creditors state that debtor's petition for a composition is insufficient in law and does not state a ground for relief under Section 75 (a to r).

The order of dismissal if based upon this ground is erroneous in that debtor filed a form of petition approved by the United States Supreme Court and her Petition was specifically approved by the United States District Court on the 23d day of June, 1936.

WHEREFORE Petitioner respectfully prays that the Order of Dismissal heretofore made on the 22d day of September, 1936, be reviewed by this Honorable Circuit Court of Appeals and set aside.

C. H. SOOY
C. D. SOOY
GLENN D. NEWTON
Attorneys for Petitioner.

[Endorsed]: Assignment of errors. Filed Oct. 21, 1936. Paul P. O'Brien, Clerk.

At a Stated Term, to wit: The October Term A. D. 1936, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twenty-sixth day of October in the year of our Lord one thousand nine hundred and thirty-six.

PRESENT: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding; Honorable FRANCIS A. GARRECHT, Circuit Judge; Honorable WILLIAM DENMAN, Circuit Judge.

[Title of Cause.]

ORDER ALLOWING APPEAL.

Upon consideration of the petition of appellant, filed October 21, 1936, for allowance of appeal herein under section 24b of the Bankruptcy Act, and of the assignments of error, filed therewith, and good cause therefor appearing,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Northern District of California, entered on September 22, 1936, dismissing petitioner's proceedings under section 75 A to R of the Bankruptcy Act be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars within fifteen days from date.

IT IS FURTHER ORDERED that if appellant desires this appeal to act as a supersedeas, bond in the sum of Five Thousand Dollars ($5,000.00) with good and sufficient security, must be given within fifteen days from date. If such supersedeas bond is one with persons as sureties then such sureties shall justify before a United States Commissioner, cost

or supersedeas bond to be forwarded to the clerk of this Court for approval.

[Title of Court and Cause.]

CITATION ON APPEAL

United States of America:

To Northern California National Bank, The Redding Savings Bank and Carr & Kennedy, a copartnership, GREETINGS:

YOU AND EACH OF YOU Are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within 30 days from the date hereof pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit wherein OLIVE LEMM, individually, and OLIVE LEMM, as Administratrix of the Estate of Charles L. Lemm, deceased, is Appellant and you are Respondents to show cause if any there be why the Order rendered against the said Appellant as in the Assignment of Errors mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable CURTIS D. WILBUR, Senior Judge of the United States Circuit Court of Appeals for the Ninth Circuit this 31st day of October, in the Year of Our Lord, One Thousand Nine Hundred and Thirty-six.

CURTIS D. WILBUR
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Received three copies of the within citation on appeal this 7th day of November, 1936.

CARR & KENNEDY

Attorneys for Redding Savings Bank, a corporation, Carr & Kennedy, and Northern California National Bank.

[Endorsed]: Filed Jan. 18, 1937. Paul P. O'Brien, Clerk.

[Endorsed]: No. 8363. United States Circuit Court of Appeals for the Ninth Circuit. Olive Lemm, Individually, and as Administratrix of the Estate of Charles Lemm, Deceased, Appellant, vs. Northern California National Bank, The Redding Savings Bank and Carr and Gregory, a Co-partnership, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed January 15, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8363

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of CHARLES LEMM, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK AND CARR AND KENNEDY, a Co-partnership,

Appellees.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

C. H. SOOY,
C. D. SOOY,
GLENN D. NEWTON,
Mills Bldg.,
San Francisco, Calif.
Attorneys for Appellant.

Parker Printing Company, 545 Sansome Street, San Francisco

Subject Index

Index of Authorities Cited

No. 8363

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of CHARLES LEMM, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK AND CARR AND KENNEDY, a Co-partnership,

Appellees.

APPELLANT'S OPENING BRIEF

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

JURISDICTION

Appellant filed her petition under Section 75 of the Bankruptcy Act in the United States District Court for the Northern District of California, Northern Division, which petition was approved by that Court

as being properly filed under said section. The United States District Courts are "courts of bankruptcy" and have original jurisdiction in proceedings under the Bankruptcy Act.

Bankruptcy Act of 1898, as amended, Section 2, (U. S. C. A. Title 11, Sec. 11);

Constitution of the United States, Art. III, Section 2;

Debtor's Petition in Proceedings Under Section 75, as amended, of the Bankruptcy Act (Printed Transcript, page 1);

Order approving Debtor's Petition (Printed Transcript, page 9).

By this appeal the United States Circuit Court of Appeals for the Ninth Circuit, sitting as a court of equity, is asked to revise the proceedings of the United States District Court within the Ninth Circuit. It is Appellant's contention that the United States District Court erred as a matter of law in dismissing the proceedings for a composition or extension agreement. The United States Circuit Court of Appeals has jurisdiction to hear this appeal.

Bankruptcy Act of 1898, Section 24 (b) (U. S. C. A. Title 11, Sec. 47 (a));

Assignments of Error (Printed Transcript, page 34);

Order Allowing Appeal (Printed Transcript, page 37).

STATEMENT OF THE CASE

Appellant is a debtor-farmer petitioning under Section 75 of the Bankruptcy Act, and she is appealing from an order dismissing her proceedings.

Appellant filed her petition and schedules (Proceeding number 6575) under Section 75 of the Bankruptcy Act on November 22nd, 1935, and her petition was approved as properly filed by an order of the United States District Court, dated November 25th, 1935 (Printed Transcript, pages 17 to 24). These proceedings were dismissed on June 15th, 1936, on the ground that no composition or extension agreement had been reached (Printed Transcript, pages 14, 15) and an amended petition under Section 75(s) which had theretofore been filed by appellant was likewise dismissed, but the grounds of this dismissal were not stated.

Appellant filed a second petition and schedules (Proceeding number 6935) under Section 75 of the Bankruptcy Act on June 22nd, 1936, and an order approving her petition was signed June 23rd, 1936 (Printed Transcript, pages 1 to 9). The appellees, here, petitioned for a dismissal of these proceedings, number 6935, and on the 22nd day of September, 1936, these proceedings were dismissed upon the ground that the former proceedings, number 6575, constituted a bar to appellant's subsequent attempt to reach a composition or extension agreement with her creditors.

ASSIGNMENTS OF ERROR

Upon this appeal, appellant will rely upon the following Assignments of Error:

Assignments of Error, 4, 5, 6 and 8 (Printed Transcript, page 35).

ARGUMENT

The primary question raised by this appeal is whether or not a debtor-farmer who had filed a petition under Section 75 (a-r), of the Bankruptcy Act, 11 U. S. C. A. 203, and subsequently filed an amended petition under Section 75 (s), as amended, may file a subsequent proceeding under Section 75 (a-r) in an attempt to reach a composition or extension agreement with her creditors, after dismissal of the prior proceedings.

This question must be answered in the affirmative. There is no provision in the Bankruptcy Act stating that a proceeding under one section of the Act is a bar to a subsequent proceeding under another section, or even under the same section.

The prohibition in the Bankruptcy Act against successive discharges within one six year period has no application, where a mere voluntary proceeding for a composition or extension has been instituted. There has not been, and in fact could not be in this proceeding, a division of the debtor's non-exempt property between her creditors without the creditors' consent.

Bankruptcy Act of United States, Sec. 14(b) 5, 11 U. S. C. A. 32(b) 5.

Reason likewise supports the affirmative answer to our query. It is entirely possible that at one particular time, possibly during a period of financial stress, an amicable agreement between a debtor and her creditors could not be reached, while at a later time under improved financial conditions such an agreement would be possible. The policy of the law is to favor amicable settlements of the financial affairs of distressed debtors, Section 75 (a-r) being a statutory example of this policy. An examination of its terms will show that creditors are amply protected from any reduction of obligation or unreasonable extension of time for payment, to which they do not agree.

I.

4. **PETITIONER ASSIGNS AS ERROR THE RULING THAT DEBTOR'S PETITION WAS FILED WITHOUT AUTHORITY OF LAW (PRINTED TRANSCRIPT, PAGE 35).**

Petitions under Section 75 (a-r) for a composition or extension may be filed at any time prior to March 3, 1938 by debtor-farmers who are insolvent or unable to meet their debts as they mature.

Bankruptcy Act, Section 75 (c);

Section 75 (c) has not been amended, and Section 75 (a-r) is constitutional.

Collins v. Welch, 75 Fed.(2nd) 894;
In re O'Brien, 78 Fed.(2nd) 715.

Consequently debtor's petition was filed by express authority of law, having been filed on June 22, 1936, by a farmer who was unable to meet her debts as they matured, and who desired to effect a composition or extension of her debts.

II.

5. CREDITORS' MOTION STATES THAT A DISMISSAL OF PROCEEDINGS UNDER SECTION 75S AS AMENDED (NEW FRAZIER-LEMKE ACT) CONSTITUTES A BAR TO THE PROCEEDINGS UNDER SECTION 75 (A TO R). PETITIONER ASSIGNS AS ERROR THE ORDER OF DISMISSAL MADE UPON THIS GROUND.

6. CREDITORS' MOTION STATES THAT THE UNITED STATES DISTRICT COURT HAS NO JURISDICTION OF PROCEEDINGS FILED UNDER SECTION 75 (A TO R) FOR A COMPOSITION OR EXTENSION WHERE PRIOR PROCEEDINGS IN WHICH DEBTOR WAS ADJUDICATED A BANKRUPT UNDER 75S WERE DISMISSED. THIS REASON FOR THE ORDER OF DISMISSAL BEING IN FACT THE SAME AS THE NEXT PRECEDING ALLEGED RULE AND BEING EQUALLY UNSOUND IS ALSO ASSIGNED AS ERROR (PRINTED TRANSCRIPT, PAGE 35).

The filing of a petition under Section 75 (a-r) may be considered as a request by a debtor-farmer for a meeting with her creditors for the purpose of discussing her financial affairs and arriving at an agreement for the composition or extension of her debts. Any action taken in such a proceeding must necessarily be voluntary. There is no "litigation" as this term is commonly used. Neither party is in fact a plaintiff or defendant.

There are numerous reasons why a debtor and her creditors may be unable to reach an agreement at a particular time. The market value of her assets may make her offer unattractive, or a creditor or group of creditors may refuse absolutely to attend meetings before the Conciliation Commissioner and consider the debtor's plan of rehabilitation. A failure to reach an agreement, for any cause whatsoever, may properly result in dismissal, as did the first proceeding instituted by debtor.

Appellees, however, take the position that because appellant has once petitioned for the right to negotiate with her creditors in the orderly manner provided by law, she may never again offer her creditors a proposal for a new agreement, regardless of how much conditions may have changed.

A failure to reach an agreement is only a temporary disability. Increased land values, better income yield, advanced prices for crops and livestock, have often changed a case from one of hopeless insolvency to one in which an agreement may be reached under which creditors are paid and a fair equity returned to the debtor.

A. Successive Petitions Permissible in Bankruptcy.

There is no prohibition against successive proceedings in bankruptcy providing the limitation against more than one discharge within a six year period is respected.

> "Section 32 (b), subdivision 5, of Title 11 U. S. C. A., Bankr. Act. par. 14b (5), as amended,

> is a bar to the bankrupt's discharge, as he was adjudicated a bankrupt herein upon his voluntary petition within six years after his first discharge in bankruptcy. Section 32 (b) subdivision 5 of the Bankruptcy Act bars a discharge within the six year period, but does not bar the filing of a petition in bankruptcy. This court has jurisdiction to receive successive petitions in bankruptcy and make successive adjudications in bankruptcy within the six-year period. The court is only limited in its jurisdiction to the granting of one discharge to the bankrupt within the six-year period. See In re Smith (D. C.) 155 F. 688; In re Little (C. C. A.) 137 F. 521; In re Johnson (D. C.) 233 F. 841."

In re Epstein, 12 Fed. Supp. 450.

Likewise it has been held that after the termination of a proceeding under Section 75 (a-r), an ordinary bankruptcy petition may be filed, and an adjudication made.

In re Neumann, 12 Fed. Supp. 427;
McKeever v. Local Finance Company, 80 Fed.(2nd) 449.

Conversely, an ordinary bankruptcy proceeding which has been terminated by a discharge, is not a bar to a petition for a composition or extension.

It is not logical to contend in the face of these authorities that a proceeding for a composition which is essentially a voluntary proceeding may not be commenced after the termination of a prior proceeding for the same purpose.

B. Doctrine of Res Adjudicata Not Applicable.

It is clear that the doctrine of res adjudicata has no application here. The mere dismissal of proceedings under Section 75 (a-r) is not a determination of an action or proceeding, since no composition or extension agreement was ever submitted to the District Court for confirmation. No question of law or fact was, or could have been, decided in the absence of an application for confirmation of a plan. Appellant did not seek any recovery from her creditors, nor even a definition of her rights as against them. She merely sought the facilities of the federal courts, established under Section 75 (a-r), through which to effect an amicable agreement with them. It could not be said that she would not have the right to negotiate with her creditors and if possible reach an agreement, outside the bankruptcy proceeding, yet appellees would deny appellant the right to seek this agreement under the Bankruptcy Act where she must voluntarily list her assets and be subject to the control and supervision of the court.

There are two further considerations, however, which entirely remove any possibility of an application of the "res adjudicata" doctrine. Appellant *herself* petitioned for the dismissal of her first petition (#6575) under Section 75 (a-r) of the Bankruptcy Act, and, to quote from the affidavit of counsel for appellees, "That on the 15th day of June, 1936, in the above entitled court an order was made by Hon. Michael J. Roche, District Judge, dismissing the proceedings taken by said debtor under Section

75 (a-r), *in accordance with her Motion for Dismissal,* above set forth" (Printed Transcript, pages 12-13). Thus we see that the dismissal was upon the voluntary motion of appellant herself, and was not, therefore, a decision on the merits as to any material fact at issue in the proceeding. At most a dismissal is evidence that the appellant and her creditors were not, at a particular time or under existing circumstances, able to reach an agreement. The right of appellant to have the proceedings dismissed upon her own motion in the absence of a counter-claim, is well settled (*Code of Civil Procedure of the State of California,* Sec. 581 (1)). Having dismissed her proceeding she is at liberty to file a new petition for the same relief within the limitation of time set by law.

But there is another reason why appellant should have been allowed to maintain the proceeding for a composition or extension. An adjudication, and even a discharge in bankruptcy, is not a bar to a subsequent proceeding for a composition or extension. Examining the facts here, we find that appellant prior to the 15th day of June, 1936, filed an amended petition under Section 75 (s) of the Bankruptcy Act, asking to be adjudged a bankrupt. Applying the rule just announced appellant was entitled, at the termination of the bankruptcy proceeding, which took place on June 15, 1936, to file a petition for a composition or extension.

The case of *Phoenix Bank v. Ledwidge,* 86 Fed.(2nd) 355, which closely resembles this case upon

the facts, is illustrative in this connection. There the debtor's second petition under Section 75 (a-r) was dismissed, not, however, because the first proceeding was res adjudicata, but solely because it appeared that the only relief open to the debtor was to file an amended petition under Section 75 (s) of the Bankruptcy Act, as amended, and in the opinion of that Court section 75 (s) as amended, was unconstitutional. The Supreme Court has exposed the fallacy of this part of the decision in the case of *Wright v. Vinton Branch Bank,* 81 L. E. 487, holding Section 75 (s) to be constitutional. It is submitted that had the *Phoenix Bank* case been decided upon the premise that the amendment of Section 75 (s) was constitutional, the debtor's petition would not have been dismissed. It may be noted in that case also, debtor had filed an amended petition under Section 75 (s) after the first petition under 75 (a-r) had been filed.

Even in the event that appellant is unable to reach the composition or extension agreement she seeks to effect, she at least has the right to proceed under Section 75(s), as amended, and obtain the relief that statute affords her. Her case is even stronger than the *Ledwidge* case in that there has been no foreclosure here, and consequently no prejudice to the secured creditors resulting from the new proceedings, as there was in the case referred to.

Phoenix Joint Stock Land Bank of Kansas City v. Ledwidge, 86 Fed.(2nd) 355.

III.

8. CREDITORS STATE THAT DEBTOR'S PETITION FOR A COMPOSITION IS INSUFFICIENT IN LAW AND DOES NOT STATE A GROUND FOR RELIEF UNDER SECTION 75 (A TO R).

THE ORDER OF DISMISSAL IF BASED UPON THIS GROUND IS ERRONEOUS IN THAT DEBTOR FILED A FORM OF PETITION APPROVED BY THE UNITED STATES SUPREME COURT AND HER PETITION WAS SPECIFICALLY APPROVED BY THE UNITED STATES DISTRICT COURT ON THE 23D DAY OF JUNE, 1936 (PRINTED TRANSCRIPT, PAGE 36).

Appellant's petition is sufficient in law and states a ground for relief under Section 75 (a-r) of the Bankruptcy Act for two self-sufficient reasons.

In the first place appellant alleges she is a farmer, personally bona fide engaged primarily in farming operations, and that she is insolvent or unable to meet her debts as they mature, and that she desires to effect a composition or extension of time to pay her debts under Section 75 of the Bankruptcy Act. These are the identical jurisdictional prerequisites enumerated in Sub-section (c) of Section 75.

Secondly, appellant's petition contains the facts, and is in the form prescribed by the Supreme Court of the United States as the official form for a petition in bankruptcy under Section 75 of the Bankruptcy Act.

Appendix IV, United States Supreme Court Reports, 77 L. E. 1517;
Bankruptcy Act, Section 75 (c), 11 U. S. C. A. § 203 (c).

In conclusion, it is respectfully submitted that appellant's petition was filed with express authority of law; that the United States District Court had jurisdiction to entertain the proceedings under Section 75 (a-r) although they were instituted by the same debtor who had theretofore filed her petition, and later, voluntarily moved for a dismissal which was granted.

It is submitted further that debtor's petition states facts sufficient to constitute ground for relief under Section 75 (a-r) of the Bankruptcy Act, and that it is sufficient in law.

Dated: April 26, 1937.

C. H. Sooy,
C. D. Sooy,
Glenn D. Newton,
Attorneys for Appellant.

No. 8363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of Charles Lemm, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK and CARR AND KENNEDY (a copartnership),

Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

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Appellees.

BRIEF FOR APPELLEES.

JURISDICTION.

The United States District Courts are invested with original jurisdiction in bankruptcy proceedings and are the "courts of bankruptcy" defined in the Act.

Bankruptcy Act (U. S. Code, Title 11, Chap. 2, Sec. 11).

The dismissal of proceedings filed under the provisions of Section (75(a-r) of the Bankruptcy Act is within the recognized jurisdiction of the District Courts.

In re Borgelt, 79 Fed. (2d) 929;

Steverson v. Clark, 86 Fed. (2d) 330;

In re Tinkoff, 85 Fed. (2d) 305;
In re Augustyn, 87 Fed. (2d) 577.

The filing of a petition for an agricultural composition and extension immediately subjects the farmer and all his property to the exclusive jurisdiction of the court.

Bankruptcy Act, Sec. 75(n);
In re O'Brien, 78 Fed. (2d) 715;
Harris v. Pacific Mutual, 91 Cal. Dec. 813;
In re Morgan, 15 Fed. Supp. 52.

The filing of a petition for relief under the provisions of Bankruptcy Act relating to agricultural compositions and extensions is equivalent of adjudication in bankruptcy.

In re Rose, 86 Fed. (2d) 69.

Rules of equity applicable to bankruptcy proceedings.

In the administration of the Bankruptcy Act, the bankruptcy court is a court of equity, and is governed by equitable doctrines.

Greif Bros. etc. Co. v. Mullinix, 264 Fed. 391;
In re Fox West Coast Theaters, 88 Fed. (2d) 212;
In re Alabama Braid Corp., 13 Fed. Supp. 336;
Nat'l Cash Reg. Co. v. Dallen, 76 Fed. (2d) 867;
Gilbert's Collier on Bankruptcy, 3rd ed., Sec. 23.

APPELLEES' STATEMENT OF THE CASE.

Appeal from order of the District Court granting motion of creditors, appellees, for dismissal of petition filed by debtor, appellant, under provisions of Section 75(a-r) of Bankruptcy Act, after the termination of prior proceedings taken by appellant under Section 75(a-r) and Section 75(s) of the Act.

In view of the fact that some of the essential facts of the case are not disclosed in the statement of the case contained in Appellant's Opening Brief, and the fact that appellees controvert parts of said statement, it should be helpful to the court, and perhaps shorten the argument, if we give here a complete statement of the facts of the case.

During November, 1935, appellant filed a petition under Section 75(a-r) of the Bankruptcy Act, numbered 6575, seeking to effect a composition or extension of her debts. The petition was filed by appellant Olive Lemm individually, and as Administratrix of the estate of Charles L. Lemm, her deceased husband. (Transcript, pages 17-18.) The schedules filed with said petition showed that petitioner's assets, valued at $28,529.00, exceeded her liabilities, listed as $23,582.76. (Transcript, pages 19-23.)

A proposal of composition with creditors (patently unreasonable), having failed of acceptance, appellant filed a motion for the dismissal of said "proceedings for a composition or extension" (Transcript, pages 12-13), and subsequently filed a petition to be adjudged a bankrupt in accordance with Section 75(s) of the Bankruptcy Act.

On June 15, 1936, in the District Court, the debtor's motion to dismiss her proceedings under Section 75(a-r) was granted, and then a motion for the dismissal of the debtor's petition under Section 75(s), previously filed by the creditors, was granted. As a matter of fact, counsel for appellant stipulated in open court for the entry of the latter dismissal, though such consent was not recorded in the clerk's minutes. (Transcript, pages 14-15.)*

Prior to June 15, 1936, the date of dismissal of the foregoing proceedings, and without the knowledge or leave of the court, the appellant paid in full the claims of some of the creditors named in her schedule of liabilities, using for said purpose some of the funds listed in her schedule of assets. (Transcript, page 15.)

This fact was not only shown, without dispute, by the affidavit filed in support of the creditors' motion to dismiss appellant's second petition for composition, but it is demonstrated by a comparison of the schedules filed by appellant with her respective petitions.

The schedule of assets filed with her first petition included the item "Cash.....$5000.00". (Transcript, page 23.)

The schedule of liabilities included the following claims:

*The order of May 28, 1936, mentioned in the minutes of June 15, was an order Judge Roche had made granting a motion by the creditors to dismiss the original proceeding under Section 75(a-r) for the absence of good faith in the proposal for composition. It was set aside, over the creditor's objection, so that appellant's counsel could present her motion for dismissal which had previously been filed by appellant.

"Open Book Account with McCormick Saeltzer Co. $251.86
Open Book Account with Dr. F. Stabel 455.00
Open Book Account with McDonald & Scott 273.50"
(Transcript, page 20.)

The schedule of assets filed with appellant's second petition (Transcript, page 8) shows cash in the sum of $2156.65, and the above claims are omitted from the schedule of liabilities. (Transcript, pages 4-5.)

As the claims which were paid aggregated $980.36, and the cash on hand was reduced from $5000.00 to $2156.65, the additional sum of $1862.99 which was subject to the jurisdiction of the bankruptcy court, remains unaccounted for.

The fact that appellant disbursed said funds and paid said claims before the entry of the order of June 15 appeared undisputably from the fact, shown by the record here, that her second petition under Section 75(a-r), showing said facts, was verified by appellant on the *12th day of June, 1936,* i. e., before the first proceedings were terminated. (Transcript, page 3.)

The second proceeding, No. 6935.

On June 22, 1936, appellant filed her second petition and schedules under Section 75(a-r). Said petition was filed by appellant individually, and as administratrix of the estate of her deceased husband, and, as in the case of her first petition, it was alleged that all the property therein set forth was the property of petitioner and the deceased. (Transcript, page 2.)

Appellees thereupon served and filed a motion for the dismissal of said proceeding (Transcript, pages 9-11), supported by the affidavit of Laurence J. Kennedy, one of appellees' counsel. (Transcript, pages 12-16.)

At the hearing of said motion there was no contradiction of said affidavit or of any fact therein averred and the motion was presented, argued and submitted in the District Court upon all the records of the court in said bankruptcy proceedings, numbers 6575 and 6935.

Said motion was granted and the proceedings dismissed by an order made in the District Court by Honorable Michael J. Roche, District Judge, on September 22, 1936. Said order is set forth *in haec verba* in the printed transcript, page 17.

We beg leave, here, to controvert the statement made in appellant's statement of the case (page 3) that said proceedings "were dismissed upon the ground that the former proceedings, number 6575, constituted a bar to appellant's subsequent attempt to reach a composition or extension agreement with her creditors".

There is nothing in the order to substantiate said conclusion of counsel, and it may be attributed to the fact that counsel for appellant who prepared the brief did not appear in the court below, and did not hear the oral comments of Judge Roche at the time the motion was argued.

During the argument in the District Court, in which the several grounds of dismissal raised by the motion

were discussed, the court expressed severe condemnation of appellant's conduct in disbursing funds and paying some of her creditors in full. Then, at the request of counsel for appellant, leave to file briefs was granted, and the major discussion in the briefs was in relation to appellees' claim of lack of good faith as raised in paragraph 4 of their motion.

Thus, although we urged, with authority, that the *dismissal* of the prior proceedings constituted a bar to the second petition, there is nothing in the record to support the claim of counsel that the court's order dismissing the second proceeding was made solely upon that ground, for, judging from the court's remarks, it may have been based upon the ground of lack of good faith on the part of the debtor, and the order may be sustained upon any meritorious ground specified in the motion.

The interests of appellees.

The Redding Savings Bank is the holder of trust deeds upon two of appellant's farms, the same being the two tracts of real property described on page 6 of the transcript. According to appellant's petition, the aggregate value of said properties is $8600.00 (Transcript, page 6) whereas the aggregate indebtedness secured by the trust deeds, as shown by the petition, was something over $19,000.00 in February, 1936 (Transcript, page 4); and more than a year's interest has since accrued.

The Northern California National Bank and Carr & Kennedy are creditors of the estate of Charles Lemm, holding unsecured claims, which have been approved by the Probate Court. (Transcript, pages 4-5.)

THE ASSIGNMENTS OF ERROR.

In appellant's opening brief counsel for appellant announce that on this appeal they rely upon assignments of error, 4, 5, 6 and 8. Therefore it should be unnecessary for appellees to take notice of any other assignment of error, but it seems appropriate here that we call the court's attention to a serious misstatement of the record contained in the transcript, in the 7th assignment of error, to the effect that the District Court decided in favor of appellant in its ruling upon appellees' claim, in the motion to dismiss, that the petition was not filed in good faith but was filed for the purpose of delaying and hindering her creditors.

This erroneous statement may doubtless be attributed to the fact, mentioned in our opening statement, that the author of the brief did not appear in the lower court.

There is nothing in the record to justify said statement, but the fact is that at the close of the argument on this motion, when he ordered the matter submitted, the district judge expressed from the bench in very positive language his disapproval of the conduct of the debtor during the original proceedings, particularly the payment of some of her creditors in full before she had filed her petition under Section 75(s).

ARGUMENT.

On this appeal the issue is not limited to the question stated in appellant's opening brief, but we believe it may properly be said that the question raised by the appeal is whether or not appellees' motion to dismiss appellant's second petition under Section 75(a-r) was properly granted upon any of the grounds presented in the District Court.

In support of the ruling of the lower court we shall present the matter under three heads.

I.

THE ORDER GRANTING THE MOTION AND DISMISSING APPELLANT'S PETITION WAS PROPERLY MADE BY THE DISTRICT COURT UPON THE GROUND THAT THE FORMER PROCEEDINGS UNDER SECTION 75(a-r) AND SECTION 75(s) AND THE DISMISSAL THEREOF WERE A BAR TO THE FILING OF A SECOND PETITION.

This topic embraces three of the grounds for dismissal specified in appellees' motion, set forth in paragraphs 1, 2 and 3 of the motion (Transcript, page 10), viz.:

> That the second petition was filed without authority of law;
>
> That the dismissal of the proceedings taken by appellant under Section 75(a-r) and Section 75(s) constituted a bar to the second petition under Section 75(a-r);
>
> That the District Court lacked jurisdiction to entertain the second petition.

The order dismissing the second petition upon said grounds is directly supported by the decision in the case of

In re Archibald, 14 Fed. Supp. 437.

In that case, as here, the original petition under Section 75(a-r) was dismissed on motion of the debtor on the ground that no composition or extension had been reached, which was held sufficient to bar the second petition.

Here we have the additional feature that the debtor also filed a petition under Section 75(s), and that same was dismissed on the adversary motion of the creditors, with appellant's consent, after she had urged and obtained the dismissal of her first petition under Section 75(a-r).

The argument of counsel that, as a matter of policy, the Act should be construed to allow successive petitions under Section 75(a-r) according to changes in general economic conditions, is not impressive.

Counsel say:

> "It is entirely possible that at one particular time, possibly during a period of financial stress, an amicable agreement between a debtor and her creditors could not be reached, while at a later time under improved financial conditions such an agreement would be possible."
>
> (Appellant's Opening Brief, page 5.)

Said proposal suggests the question: What are the creditors expected to do during the interval between the abandonment of the first petition and the filing of

the second? Are some of the creditors to be paid, and the others delayed by the second proceeding?

Further, the reasoning of counsel is not pertinent in the present case.

It is obvious that the second petition was not prompted by a change of circumstances or economic conditions in the interval between the two proceedings, but the record shows that the second petition was actually prepared and verified by appellant before the termination of the proceedings under the first petition.

There was a change, it is true, in the debtor's circumstances, namely, she had paid some of her unsecured creditors in full, without regard to the like claims of the appellees; and having done this, it was planned to again suspend the enforcement of appellees' claims invoking the statute.*

However, having used some of the funds and paid some of the creditors listed in the schedules filed with her first petition, for which appellant would be answerable to the bankruptcy court in her proceedings under Section 75(s), she asked for the dismissal of her first petition and consented to dismissal of the petition filed under Section 75(s), when the new petition was ready, so her plan could be put into operation.

The language of the court in the case of *In re Archibald,* supra, is apposite:

---

*The filing of the second petition was timed to effect a stay of a trustee's sale under the deeds of trust held by the appellee savings bank; and in a second proposal for composition, presented after the motion to dismiss the second petition was served and filed, the debtor offered her remaining unsecured creditors 66⅔% of their claims. (Transcript, page 30.)

> "The effect of filing such petition and application is to suspend, for the time being, the right of any creditors to enforce his claim.
>
> "If, upon the failure of a proceeding, the judgment of dismissal, the farmer-debtor may commence a second proceeding against the same creditors and again suspend the enforcement of all claims against him, there is no reason why he could not, upon failure of the second proceeding, commence a third proceeding, and so on ad infinitum, and thus indefinitely prevent his creditors from enforcing their claims against him."
>
> (Opinion, p. 439.)

The statute expressly provides what shall be done in case a farmer fails to obtain the acceptance of a proposal for composition or extension and there is nothing in the Act to justify a change in procedure at the election of the debtor.

Section 75(s) provides:

> "Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

That is very different from saying, as counsel contend, that any farmer failing to obtain the acceptance of his proposal for composition, may dismiss his petition for a composition or extension and later, when it may suit his fancy, file another petition under Section 75(a-r).

None of the cases cited in appellant's opening brief deal with the question presented on this appeal, or support the assignment of error upon which appellant relies.

Two of the authorities cited in appellant's brief, the cases of *In re Neumann,* 12 Fed. Supp. 427, and *McKeever v. Finance Co.,* 80 Fed. (2d) 449, merely recognize and uphold the statutory right of a petitioner to an adjudication in bankruptcy, following proceedings for composition, but nothing is said or determined by the court in either of said decisions which upholds the claim that a debtor may, at his election, file successive petitions under Section 75(a-r).

In re Epstein, 12 Fed. Supp. 450, cited by appellant, was an ordinary bankruptcy case, and decides nothing contrary to the ruling of the District Court in the present case.

There is no analogy between the case of *Phoenix Bank v. Ledwidge,* 86 Fed. (2d) 355, in which the court decided against the debtor, and the present case. On the other hand the distinction is manifest from a cursory reading of the decision in said case. There, the first petition was filed under the original Frazier-Lemke Act of March 3, 1933, and the second petition was filed under the amended Act of 1935; and in its opinion the court said:

> "The reason for instituting the new proceeding was obviously to take advantage of the amendment of August 28, 1935, which substituted a new subsection (s) for the one declared unconstitutional by the Supreme Court in Louisville Joint Stock Land Bank v. Rudford."

We respectfully submit that the statutory mode should be the gauge of the farmer debtor's procedure and relief under this emergency legislation, and that the order appealed from should be sustained upon the ground that the statute did not authorize the debtor to file a second petition under Section 75(a-r) under the circumstances shown in this case.

II.

THE ORDER GRANTING THE MOTION AND DISMISSING APPELLANT'S PETITION WAS PROPERLY MADE BY THE DISTRICT COURT UPON THE GROUND THAT THE PROCEEDING WAS NOT IN GOOD FAITH, BUT WAS FILED FOR THE PURPOSE OF DELAYING AND HINDERING HER REMAINING CREDITORS.

One of the grounds specified in appellees' motion for dismissal was:

> "4. That the petition filed herein by said debtor under Section 75(a-r) was not filed in good faith, and was filed for the purpose of delaying and hindering her creditors."
>
> (Transcript, page 11.)

The following facts were stated in the affidavit filed in support of appellees' motion for dismissal, viz.:

> "That said debtor, after filing the foregoing proceedings under Section 75, as amended, of the Bankruptcy Act, No. 6575, and prior to said decision and order of Hon. Michael J. Roche, District Judge, entered on the 15th day of June, 1936, out of the cash listed in the schedule of her assets, filed with said original petition under Section 75, paid the debts due and owing to certain

creditors of said debtor whose claims were listed as liabilities in Schedule A filed with said original petition under Section 75, and said creditors thereby received a preference over the creditors represented herein by affiant;

"That the value of the assets of said debtor, as affiant is informed and believes, is greatly in excess of the value shown by Schedule B, attached to the petition herein; that the total value of the debtor's assets, according to a fair and reasonable value of same, exceeds the total amount of liabilities; and affiant is informed and believes, and upon such information and belief hereby deposes that the petition of the debtor herein was filed for the purpose of delaying and hindering the creditors named in the foregoing motion, and that said petition was not filed in good faith."

(Transcript, page 15.)

No counter-affidavit was filed, and there was no denial of said averments of fact.

With such a record, it should be sufficient here to cite the rule that this court does not review questions of fact on appeals from proceedings in bankruptcy.

In re Harris, 78 Fed. (2d) 849.

Said rule has been applied to the question of the debtor's good faith in filing a petition for composition or extension.

In re Augustyn, 87 Fed. (2d) 577.

In said case, which arose under Section 74, the court said:

"The question of good faith is a fact question, the determination of which this court will not disturb if there is substantial evidence support-

ing the conclusion of the lower court and there appears no abuse of discretion."

Opinion, 78 Fed. (2d) 579.

On the merits, we have shown in our statement of the case, supra, how the facts set forth in the debtor's schedules corroborate the charge that appellant paid some of her creditors in full before the dismissal of the first proceedings; and that they also show that the sum of $1862.99, out of the cash listed in the first schedule of assets, was not accounted for in the schedules filed with the second petition.

Irrespective of any element of contempt, the payment in full of the claims of some of her creditors and the omission to pay any of the claims of appellees was sufficient evidence of the debtor's lack of good faith to warrant the order of dismissal.

As to the other matters stated in the affidavit, and not contradicted, support may also be found in a comparison of the schedules filed by appellant.

From the schedules filed with the first petition it appeared that the petitioner's assets exceeded her liabilities. (Transcript, pages 21-23.)

When the schedule of assets filed with the second petition is examined it will be found that the first two parcels of real property are listed as of much lower value than was given for the same lands in the first petition (Transcript, pages 6, 21-22), and no value is listed for the "Smith Place on Stillwater", which was valued in the original schedule at $2000.00 (Transcript, page 22), but is actually worth $7500.00,

as was stipulated before the Conciliation Commissioner.

Thus it is made to appear by the later schedules that the liabilities greatly exceed the assets. Part of the reduction of assets is due, of course, to the change in the item of cash from $5000.00 to $2156.65.

Between November, 1935, and June, 1936, there was no general decrease in land values or farm prices, and the change in values set forth in the debtor's second petition may properly be interpreted as a deliberate attempt to make it appear that petitioner was bankrupt, and our affidavit, to the effect that the debtor's assets are greatly in excess of the value shown by Schedule B, is actually supported by the debtor's first verified petition.

In regard to the "Smith Place on Stillwater", it will be noted that appellant, in her second petition (Transcript, page 7), lists same, without valuation, as having been "set aside as a Probate Homestead by the Superior Court in and for the County of Shasta".

Having thus brought this matter into the record, we believe it is proper for us to point out here that said proceeding was another instance of the debtor's disregard and contempt of the jurisdiction of the bankruptcy court. The records of the Superior Court show that the application for said probate homestead was filed on March 11, 1936, while the first proceedings were pending in the District Court, and the order setting apart the homestead was filed on June 8, 1936.

The Superior Court was without jurisdiction to make said order.

Security etc. Bank v. Superior Court, 12 Cal. App. (2d) 140;

Harris v. Pacific Mutual etc. Co., 6 Cal. (2d) 384;

Silberblatt v. Forcey, 11 Fed. Supp. 484.

There was also presented to the District Court, in the argument on this feature of the case, the point that the debtor's second proposal of compromise and extension to creditors, dated August 31, 1936 (Transcript, pages 28-31), was not reasonably calculated to effect a debt liquidation.

In said proposal the appellant offered to settle the claims of the remaining unsecured creditors at 66⅔rds cents on the dollar, and offered to pay "in full liquidation" of the liens against the real property the appraised value of same, to be thereafter ascertained, provided she should have three years within which to pay said amount to the bank; and at the end of said period, if she failed to pay, the bank might take the property, provided it would agree *that it would not take a deficiency judgment.* Other details of the proposal, in line with provisions contained in Section 75(s), need not be mentioned here.

In brief, the debtor proposed that she should enjoy for three years all the advantages conferred upon the debtor by Section 75(s), and, *in addition,* that she should have a guarantee that the bank, after waiting three years, would waive its right to a deficiency judg-

ment in case it should finally have to take the property on foreclosure.

> The debtor's proposal of composition with creditors should contain "an *equitable* and feasible method of liquidation", and be *for the best interests* of the creditors, as well as his own.
>
> *In re Schaeffer,* 14 Fed. Supp. 807.

> "Certainly no debtor, acting in good faith, could reasonably expect acceptance by his creditors of a proposal fixing an extension or composition substantially more favorable to him and less favorable to creditors than the terms of subsection (s)."
>
> *In re Vater,* 14 Fed. Supp. 631.

It is respectfully submitted that the order appealed from was justified upon the ground of lack of good faith on the part of the debtor.

III.

THE PETITION WAS INSUFFICIENT IN LAW IN THAT IT DID NOT CONFORM TO THE GENERAL ORDERS IN BANKRUPTCY.

Subsection 9 of General Order No. 50(L) provides that in cases where an administrator files a petition under Section 75 he shall file with his petition certified copies of certain records of the probate court, including "a copy of an order of the probate court authorizing him to file the petition".

As the transcript shows, none of the required papers were filed with the petition in this case, which was

filed by appellant individually and as administratrix of the Estate of Charles Lemm, deceased; and the fact is that no order authorizing said administratrix to file said petition had ever been made in the probate court.

In the affidavit filed in support of the motion to dismiss (Transcript, page 16), it was shown that probate proceedings were then pending in the Superior Court of Shasta County, and that the petition was filed in disregard of the jurisdiction and authority of the probate court.

As we have shown above, there was no contradiction of said affidavit.

General Orders in bankruptcy have the force and effect of law.

Sabin v. Blake-McFall Co., 223 Fed. 501;
In re Gerber, 186 Fed. 693.

We respectfully submit that the order of the District Court should be affirmed.

Dated, Redding, California,
June 28, 1937.

CARR & KENNEDY,
FRANCIS CARR,
LAURENCE J. KENNEDY,
Attorneys for Appellees.

No. 8363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of Charles Lemm, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK and CARR AND KENNEDY (a copartnership),

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

GLENN D. NEWTON,
Court House, Redding, California,
Attorney for Appellant and Petitioner.

BYRON COLEMAN,
155 Sansome Street, San Francisco, California,
Of Counsel.

FILED
JAN 19 1938
PAUL P. O'BRIEN,
CLERK

Table of Authorities Cited

Cases

Codes and Statutes

No. 8363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLIVE LEMM, Individually, and as Administratrix of the Estate of Charles Lemm, Deceased,

Appellant,

vs.

NORTHERN CALIFORNIA NATIONAL BANK, THE REDDING SAVINGS BANK and CARR AND KENNEDY (a copartnership),

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant Olive Lemm, individually, and as administratrix of the estate of Charles Lemm, deceased, respectfully requests a rehearing on the following grounds:

1. That the order to dismiss her petition under Section 75 of the Bankruptcy Act (11 U.S.C.A. Section 203) should not have been made with prejudice, and

2. That her petition was filed in good faith.

Section 75 of the Bankruptcy Act declares that it is enacted as an emergency measure, and as this Court knows the purpose was to give relief to farmers from the financial difficulties brought about by the depression. The appellant in this case seeks nothing more than the relief permitted to her under the act. The act is in two parts. Sections A to R provide for the filing of a petition praying for a composition with the farmer's creditors, or an extension of time, within which to pay his debts. If an agreement cannot be reached, then under subdivision S, *which was not a part of the original act,* the farmer may ask to be adjudged a bankrupt or to be permitted to retain possession of his property for a period of three years on certain terms, during which time the District Court, in the exercise of its equitable jurisdiction shall protect both debtor and creditor to the end that neither shall be deprived of his property without due process. The appellant took advantage of the provisions of this act when on November 22nd, 1935, she filed the proceedings in the District Court Number 6575, which hereafter we will designate as the first proceedings. At that time, there was a paucity of judicial interpretation and the bar, as well as many of the District Courts were doubtful as to the proper procedure to be followed. On May 27th, 1935, further confusion was created when subdivision S, which had been added in 1934, was held unconstitutional by the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 79 L.Ed. 1593. A new subdivision S was enacted by Congress on August 28th, 1935, less than three months before appellant com-

menced her first proceedings. Counsel may, therefore, be excused if, in pioneering under this act, they failed to follow procedure, which later use and judicial construction showed to be proper. Even the District Courts were uncertain at the time of appellant's first proceedings as to the proper practice, and after the decision of the Supreme Court declaring the original subsection S unconstitutional, expressed doubts as to the constitutionality of the new subdivision S.

Counsel for appellant in this case proceeded in the best of faith in presenting appellant's case to the District Court. The District Court, not only in the present case, but in other similar cases, tacitly encouraged delay while awaiting a ruling by the Supreme Court on the constitutionality of the new subsection S. At no time during either the first or the second proceedings did the District Court censure appellant herein for dilatory tactics. There was no intent or desire on the part of appellant to hinder or delay creditors. As soon as appellant learned that she could not make a composition, she filed her motion for dismissal. This motion was continued from time to time by the Court of its own motion. It was not until a long time subsequently, that the creditors filed their petition to dismiss on the ground of bad faith. In the long lapse ensuing, for which appellant was in no way responsible, counsel for both parties stipulated to submit both motions *without argument,* whereupon, and on May 28th, 1936, the District Court dismissed the first proceedings upon the creditor's motion. It was then that petitioner filed an

amended petition to take advantage of subdivision S, and the creditors moved to dismiss the same. On June 15th, 1936, this motion came on for hearing before the District Court. On that occasion, after hearing all of the facts, the District Court set aside its order granting the creditor's motion to dismiss for the absence of good faith and granted appellant's own motion for dismissal for inability to make a composition. The Court at the same time dismissed the proceedings under subsection S without stating any grounds for doing so. There had at this time been no ruling by the Supreme Court on the constitutionality of this new subsection.

This Court has stated in its opinion that the dismissal of the first proceedings was no bar to the commencement of the second proceedings. Also the good faith of the first proceedings is not in question, and in fact, the record of the first proceedings will affirmatively show that the Court believed them to have been taken in good faith inasmuch as on June 15th, 1936, it set aside its previous order, made without a hearing, and permitted the dismissal to be entered on the ground of inability to make a composition. Perhaps appellant should have filed an amended petition under subsection S instead of her motion to dismiss, but we submit that the reason was that the law was new and doubtful; that counsel interpreted it to the best of his ability; that subsection S had once been declared unconstitutional; that the new subsection S had not yet been passed upon by the Supreme Court; and, that the District Courts themselves had exhibited a desire to wait before granting

relief under the new subsection S until the Supreme Court had spoken. There was no intention in following this procedure to hinder or delay creditors. Counsel's only desire was to file a new petition and ask for relief allowed under subsection S, just as soon as it was feasible to obtain it. The new subsection was not declared constitutional until March 29th, 1937. *(Wright v. Vinton Branch of the Mountain Trust Bank,* 300 U.S. 440, 81 Law Edition, 736.) Prior to that time the new subsection had been declared unconstitutional by the District Court of Virginia and the Circuit Courts of Appeal of the Fourth Circuit, the Seventh Circuit and the Eighth Circuit. The legislation had been sustained in the Fifth Circuit. (See the opening paragraph of the opinion of Mr. Justice Brandeis.) The District Courts of this state were extremely dubious of the constitutionality of the new subsection S and for this reason they were willing to keep alive the petitions under Section 75 until such time as the Supreme Court settled the question.

Appellant's only desire in this case is to be permitted the relief to which she is entitled under said subdivision S. It is the policy of the law to allow her this relief. We respectfully submit that there is nothing in the record to show that she has forfeited this right. This Court suggests that the proposal for composition advanced by appellant was even less favorable to the secured creditor than the terms guaranteed him under subsection S, and for that reason bad faith could be imputed to her. But the terms of her offer were approximately the same as the relief to which she would be entitled under subsection S, with

the exception that she asked her secured creditor to agree not to take a deficiency judgment. But it has become the policy of the law of California to place many limitations about the right to deficiencies, which formerly did not exist.

An action for a deficiency must now be brought within three months after the time of sale or it is barred by limitation.

Code of Civil Procedure, Section 337.

No deficiency can be allowed unless the notice of breach and election to sell has been recorded more than a year before the date of the sale.

Civil Code, Section 2924½.

Nor can a deficiency be obtained for more than the difference between the fair market value of the property and the amount of the indebtedness where an appraisal has been demanded by either party.

Code of Civil Procedure, Section 580 (a).

Subsection S also provides that the debtor shall have ninety days to redeem by paying the amount for which the property is sold, together with five per cent per annum interest. Except for the one request that her secured creditor waive the deficiency, which it has now become the policy of the law to favor, she has asked no more than the law permits.

We respectfully submit that the policy of Section 75 is one of liberality to the debtor; that in the present state of the record, she should not be charged with bad faith, and that she should be permitted to seek relief under subsection S and that this Court

give her at least the right to take such proceedings as will entitle her to this relief. For that reason we respectfully submit that the words "with prejudice" be struck out of the order to dismiss and that appellant be permitted to file a new petition for the sole object of obtaining the rights afforded her by subsection S.

Dated, January 19, 1938.

GLENN D. NEWTON,
Attorney for Appellant and Petitioner.

BYRON COLEMAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing, in my judgment, is well founded and that it is not interposed for delay.

Dated, January 19, 1938.

BYRON COLEMAN,
Of Counsel for Appellant and Petitioner.

No. 8364

United States

Circuit Court of Appeals

For the Ninth Circuit.

NG FOOK,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

FILED

NOV 25 1936

PAUL P. O'BRIEN,
CLERK

Parker Printing Company, 545 Sansome Street, San Francisco

No. 8364

United States

Circuit Court of Appeals

For the Ninth Circuit.

NG FOOK,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle,

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Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Parker Printing Company, 545 Sansome Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL.

MR. EDWARD H. CHAVELLE,
Attorney for Appellant,
315 Lyon Building,
Seattle, Washington.

MESSRS. J. CHARLES DENNIS and
F. A. PELLEGRINI,
Attorneys for Appellee,
222 Post Office Building,
Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21041

In the Matter of the Application of
NG FOOK
For a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable Judge of the Above Entitled Court:

Comes now your petitioner, Edward H. Chavelle, attorney for Ng Fook, son of Ng Ming Yin, a citizen of the United States, and files this his petition

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

for a writ of habeas corpus for the said Ng Fook, and respectfully represents and shows:

I.

That the grandfather of the applicant Ng Fook, whose name was Ng Fun, was born in the Hawaiian Islands on August 13, 1885. This fact is attested by a certificate signed and sealed by the proper officer in the Hawaiian Islands, attesting the fact that the said Ng Fun was born in the Hawaiian Islands. Prior to 1902 the said Ng Fun left the Hawaiian Islands and went to China, where in 1902 there was born to him the father of the applicant, Ng Ming Yin. The latter has been recognized by the immigration authorities as a citizen of the United States, and this is conceded by the government, and he has made frequent and periodic trips from the United States to China and has returned without question and has always been issued a return certificate No. 430. The applicant herein is the son of Ng Ming Yin.

II.

That, being a citizen of the United States, the applicant applied for admission to the Commissioner of Immigration and Naturalization at the Port of Seattle as a citizen of the United States; that thereupon and thereafter, at a hearing on said application before said Commissioner and before a Board of Special Inquiry convened under the law by said Commissioner to pass upon said application and find and determine the truth thereunder, there

was then and there presented to and taken by said Board testimony and evidence tending to show and showing the citizenship of [2] the applicant and his right to admission to the United States.

III.

That, not withstanding the facts as hereinabove set forth and the testimony presented to the Board of Special Inquiry, establishing the United States citizenship of your applicant as aforesaid, and notwithstanding that said evidence and testimony before said Board stood and now stands uncontroverted by any material testimony, and further that the government at no time has raised any serious question as to the facts in the case, and the whole issue, as is impliedly conceded by the records of the immigration department and the rulings and the briefs submitted, is one of law, and the question raised is whether or not Ng Ming Yin, who was born in 1902 in China, took the United States citizenship of his father, Ng Fun, who was born in the *the* Hawaiian Islands, the government has contended, and the Board of Special Inquiry held, that said Ng Ming Yin, the father of the applicant, did not take the United States citizenship of his father, by reason of the fact that at the time of his birth the English common law rule that a child born abroad of a father who was a subject of England did not take the nationality of his father. Thus it is apparent that the Board of Special Inquiry decided this matter upon a question of law, and it is con-

tended by the applicant that in deciding said question of law they were in error as will be more particularly set out in the following paragraphs of this petition.

IV.

That thereupon and thereafter, on appeal from said order of rejection and deportation to the Honorable Secretary of Labor, said order was by her on June 3, 1936, affirmed and said appeal dismissed, all with the full knowledge on the part of said Commissioner and Board at the Port of Seattle and said Secretary of Labor of the proofs of citizenship and parentage and other convincing evidence so taken and filed in the proceedings; their action being so taken arbitrarily, capriciously, wrongfully and unfairly, against the interest and rights of the applicant, for the reason that they in effect concede all of the facts which are contended by the applicant herein, but refuse him admission [3] upon the basis of a legal proposition which is not the law and has no application to the rights of the applicant herein.

V.

That both the Board of Special Inquiry and the Secretary of Labor impliedly admit the facts contended by the applicant herein, but base their decision upon an erroneous conception of the law applicable. They were clearly in error when they took the position that the English common law rule was applicable so that the father of the applicant, Ng Ming Yin, could not have taken the United States

citizenship of his father, the grandfather of the applicant. There is no dispute but what the grandfather of the applicant herein was born in the Hawaiian Islands. This is attested by a birth certificate bearing the proper seal of the officer, and there is no evidence to controvert this; and further, there can not be any dispute that a person born or naturalized in the Hawaiian Islands automatically became a citizen in 1894. Article 17, Section 1, of the Constitution of the Republic of Hawaii, adopted in 1894, provides:

> "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

And further, that all citizens of the Republic of Hawaii automatically became citizens of the United States under the annexation act of 1900 making the Hawaiian Islands a territory of the United States and setting up a territorial government. Section 4 thereof provides:

> "All persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

VI.

The basis of the law of the Secretary of Labor and the Board of Special Inquiry to the effect that the common law rule applied to the birth of the father of the applicant, the English common law

being that a child born of a citizen in a foreign country does not take the citizenship of his father, is based solely upon Section 1100 of the Civil Laws of Hawaii, originally [4] enacted in 1892, (this Section can be found in the Revised Laws of Hawaii, 1925, Volume 1, Chapter 1, Section 1, Title 1) to the effect:

> "The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, * * *"

Now, the Board of Special Inquiry and the Secretary of Labor held that this was a complete wording of the statute at the time of the birth of the father of the applicant in 1902. The applicant contends, however, that there was a part omitted from this statute, which was in effect at the time of the birth of the father of the applicant, which reads as follows:

> "* * * except as otherwise expressly provided by the Constitution and Laws of the United States and the Laws of the Territory fixed by Hawaiian judicial procedure or usage * * *"

It is the contention of the applicant herein that this latter provision was a part of the law in 1902, when the father of the applicant was born, although the compilation of the code from the original session laws, which are not available to the applicant, leaves

some doubt as to the actual date when this latter part was either added on or became concurrently a part of the above provision.

VII.

Moreover, it is contended by the petitioner that this is immaterial, due to the fact that under the annexacion act which made the territory of Hawaii a territory of the United States and set up a territorial government, the laws and Constitution of the United States became a part of the organic law of the government of Hawaii under the sovereignty of the United States and therefore became a part of the Constitution of said government. Section 5 of said act provided:

> "That the Constitution and Laws of the United States are locally applicable (with some exceptions immaterial here) to the same force and effect in the territory as elsewhere in the United States."

VIII.

Thus, it is apparent that the statutes of the United States with respect to citizenship in 1900 automatically became a part of the laws of Hawaii. Moreover, a case decided in 190 [5] U. S. Page 197, United States Supreme Court, makes clear that in 1900 the annexation act made the Constitution and Laws of the United States a part of the laws of the Territory of Hawaii. At that time there had been in effect for many years an act with respect to chil-

dren born of citizens without the limits of the United States, which was passed in 1802 with certain amendments in 1885. The statute as it existed from 1885 up until 1907 will be found to be identical with the first sentence of 8 U. S. Code Annotated, Section 6; that is to say, that the latter sentences were added at or subsequent to 1907; the first sentence reads as follows:

> "All children born out of the limits and jurisdiction of the United States are declared to be citizens of the United States, but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Therefore, there can be do dispute about the fact that in 1902, the date of the birth of the father of the applicant, that under the laws of the Territory of Hawaii the father of the applicant automatically became a citizen of the United States, by reason of the fact that he was born the son of a citizen of the United States, regardless and irrespective of the fact that he was born in China.

This fact is recognized by a decision of the Hawaiian Supreme Court in 1 Hawaiian Reports, 118, decided in 1901. Quoting from the opinion of the court:

> ". . . and the rules of international law will prevail that in the absence of any enactment in relation thereof, and (that) the citizenship of the children followed that of the father, in this case a subject of China were it not for the Constitution."

The government has heretofore relied upon a decision of the Circuit Court of Appeals from this district, in 69 Federal 2nd, page 681, which holds under certain facts that the son of a citizen of the United States who became a citizen by virtue of the fact that all citizens of the Republic of Hawaii were made citizens of the United States at the time of the annexation of Hawaii, did not take the citizenship of the father. However, that case is not at point here, because a careful reading of the same [6] will disclose that the petitioner in that case was born in 1894 in China, which was prior to the annexation act of 1900, which in any event incorporated the laws and statutes of the United States with respect to citizenship. The petitioner in that case was unfortunate in not being born subsequent to 1900. In other words, had the petitioner been born subsequent to that date, it is evident that he would have automatically become a citizen of the United States, for the reason that at that time the statutes with reference to citizenship of persons born abroad of citizens of the United States provided that they automatically became citizens of the United States.

The applicant here, however, is more fortunate in that his father was born in 1902, of a citizen of the United States, and in this connection it should be further pointed out that the father has on numerous and repeated occasions returned to the United States, so as to bring him within the provisions of the statute (8 U. S. Code Annotated, 6) to the effect that the rights of citizenship shall not descend to

children whose fathers have never resided in the United States.

IX.

That, notwithstanding the facts as above set forth, said Ng Fook is now detained, imprisoned, confined and restrained of his liberty by the Honorable Marie A. Proctor, United States Commissioner of Immigration and Naturalization at the Port of Seattle, at and in the Immigration Station in the City of Seattle, County of King and State of Washington, in the District aforesaid, and within the jurisdiction of this court, said detention, imprisonment, confinement and restraint being for the pretended and supposed reason that, notwithstanding the facts as hereinbefore set forth, said Ng Fook is not entitled to admission into the United States.

X.

That the said detention, imprisonment, confinement and restraint of the said Ng Fook is not upon or under any process issued by any final judgment of any court officer or body having authority in the premises to commit, nor upon any warrant [7] issued from this court, nor from any court upon any indictment or information.

XI.

That the applicant has made satisfactory arrangements with the Commissioner of Immigration and Naturalization at Seattle in regard to the monetary deposit as maintenance charges and expenses of the applicant pending this proceeding.

WHEREFORE, your petitioner prays that an order be issued herein, ordering and commanding the said Honorable Marie A. Proctor, as Commissioner aforesaid, to appear in this court on the 22nd day of June, 1936, at 10:00 o'clock A. M., and show cause why a writ of habeas corpus should not issue herein; and that, upon said hearing, a writ of habeas corpus issue in due form as provided by law; and that, pending further proceedings herein, said Commissioner of Immigration and Naturalization be enjoined and restrained from deporting said Ng Fook, the applicant herein.

EDWARD H. CHAVELLE
Petitioner.

Edward H. Chavelle
Attorney for Applicant
315 Lyon Building
Seattle, Washington

State of Washington
County of King—ss.

EDWARD H. CHAVELLE being first duly sworn, upon his oath deposes and says: That he is the above named petitioner; that he has read the foregoing petition, knows the contents thereof and believes the same to be true.

EDWARD H. CHAVELLE

Subscribed and sworn to before me this 9th day of June, 1936.

[Seal] HOWARD W. HEDGCOCK
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Jun 9, 1936. [8]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE.

TO THE HONORABLE JOHN C. BOWEN, Judge of above entitled Court:

Comes now the respondent, MARIE A. PROCTOR, as United States Commissioner of Immigration and Naturalization at the Port of Seattle, Washington, and, for answer and return to the Order to Show Cause entered herein, certifies that the said NG FOOK has been detained by this respondent since the time he arrived from China at the Port of Seattle, Washington, to wit: February 1, 1936, as an alien Chinese person not entitled to admission into the United States under the laws of the United States pending a decision on his application for admission as a citizen thereof on his claim of being a foreign-born son of a citizen of the United States named Ng Ming Yin; that, at a hearing before Board of Special Inquiry at the Seattle Immigration Station, the said NG FOOK failed to furnish satisfactory proof that he was a son of Ng Ming Yin and his application for admission into the United States was denied for that reason and also on the ground that his admission is prohibited by Section 13 (a) and Section 13 (c) of the Immigration Act of 1924 and the Chinese Exclusion laws, and for the further reason that his alleged father, Ng Ming Yin, is not a citizen of the United States; that the said NG FOOK appealed from this decision of the Board of Special

Inquiry to the Secretary of Labor and thereafter the decision of the Board of Special Inquiry was affirmed by the Secretary of Labor and the said NG FOOK was ordered returned to China; that, since the final decision of the Secretary of Labor, respondent has held, and now holds and detains, the said NG FOOK for deportation from the United States as an alien person not entitled to admission into the United States under the laws of the United States, and subject to deportation under the laws of the United States.

The Original record of the Department of Labor, including all exhibits, both on the hearing before the Board of Special Inquiry at [9] Seattle, Washington, and on the submission of the record on the appeal to the Secretary of Labor at Washington, D. C., in the matter of the application of NG FOOK for admission into the United States, is hereto attached and made a part and parcel of this Return, as fully and completely as though set forth herein in detail.

WHEREFORE, respondent prays that the petition for a Writ of Habeas Corpus be denied.

MARIE A. PROCTOR

United States of America,
Western District of Washington,
Northern Division—ss:

MARIE A. PROCTOR, being first duly sworn on oath deposes and says: That she is United States Commissioner of Immigration and Naturalization at the Port of Seattle, Washington, and the re-

spondent named in the foregoing Return; that she has read the foregoing Return, knows the contents thereof and believes the same to be true.

MARIE A. PROCTOR

Subscribed and sworn to before me this 12th day of June, 1936.

[Seal] D. L. YOUNG

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed July 7, 1936. [10]

[Title of Court and Cause.]

JOURNAL ENTRY DENYING PETITION FOR WRIT OF HABEAS CORPUS.

Now on this 20th day of July, 1936, at 2 P. M., Edward H. Chavelle, Esq., appearing for the plaintiff, and F. A. Pellegrini, Assistant United States District Attorney appearing for the Government, this cause comes on for hearing on Return to Order to Show Cause. Arguments of counsel are heard at length. Writ of Habeas Corpus is denied and rule discharged. Exception allowed.

Journal No. 23, Page 962. [11]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21041.

In the Matter of the Application of
NG FOOK
For a Writ of Habeas Corpus.

ORDER DENYING WRIT.

The above entitled matter having duly come on for hearing before this court, upon the Return of the United States Commissioner of Immigration and Naturalization to the order to show cause heretofore entered herein, the respective parties being represented by Edward H. Chavelle for the petitioner, and J. Charles Dennis and F. A. Pellegrini, United States Attorney and Assistant United States Attorney, respectively, for the respondent, and the court being fully advised in the premises, having directed that the order to show cause be dismissed;

NOW THEREFORE, IT IS BY THIS COURT ORDERED, ADJUDGED AND DECREED that said order to show cause be and the same is hereby dismissed. IT ALSO IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Writ of Habeas Corpus as prayed for be, and the same is hereby DENIED: PROVIDED, however, that the petitioner may, within thirty days, file notice of appeal, and, in the event that appeal be taken,

and on condition that the petitioner shall deposit with the Commissioner of Immigration and Naturalization at Seattle such sum or suns of money as may be required for said petitioner's maintenance at the Seattle, Washington, Immigration Station during the pendency of said appeal, deportation shall be stayed pending the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit, or by the United States Supreme Court should the cause be taken to that Court on appeal.

DONE IN OPEN COURT this 14th day of October, 1936.

JOHN C. BOWEN,
United States District Judge. [12]

Presented by
HOWARD HEDGCOCK for
EDWARD H. CHAVELLE,
Atty for Petitioner.

O. K. as to form.
J. CHARLES DENNIS,
by F. A. Pellegrini,
Asst. U. S. Atty.

Received a copy of the within order this 14 day of Oct., 1936.

J. CHARLES DENNIS,
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [13]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Ng Fook, the appellant above named, deeming himself aggrieved by the order and judgment entered herein on the ..... day of October, 1936, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of the record of the proceedings and papers, together with the immigration record in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

EDWARD H. CHAVELLE
Attorney for Appellant.

Received a copy of the within Petition for Appeal this ..... day of October, 1936.

.....,
Attorney for Appellee.

Received a copy of the within Petition for Appeal this 14 day of Oct., 1936.

J. CHARLES DENNIS,
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [14]

[Title of Court and Cause.]

NOTICE OF APPEAL.

TO: Marie A. Proctor, United States Commissioner of Immigration and Naturalization at the Port of Seattle, and J. Charles Dennis, her Attorney:

You, and each of you, are hereby notified that the appellant above named, Ng Fook, hereby and now appeals from that certain order, judgment and decree made herein by the above entitled court on the ..... day of October, 1936, adjudging, holding, finding and decreeing that the above named petitioner be denied a writ of habeas corpus, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

EDWARD H. CHAVELLE
Attorney for Appellant.

Received a copy of the within Notice of Appeal this 14 day of October, 1936.

J. CHARLES DENNIS
Attorney for Appellee.

[Endorsed]: Filed Oct. 14, 1936. [15]

[Title of Court and Cause.]

ASSIGNMENT OR ERRORS.

The court erred in holding and deciding that a writ of habeas corpus should be denied to the peti-

tioner herein, denying him admission to the United States as a citizen thereof.

EDWARD H. CHAVELLE
Attorney for Appellant.

Received a copy of the within Assignment of Errors this 14 day of October, 1936.

J. CHARLES DENNIS
Attorney for Apellee.
U. S. Atty.

[Endorsed]: Filed Oct. 14, 1936. [16]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now, on, to-wit, this 14th day of October, 1936, it is ordered that the appeal herein be allowed as prayed for; and it is further ordered that the Commissioner of Immigration at the Port of Seattle shall retain custody of said appellant pending appeal and the further orders of this Court and the orders of the United States Circuit Court of Appeals for the Ninth Circuit, the petitioner herein being required to pay his maintenance at the United States Immigration Station while so detained.

Done in open court this 14th day of October, 1936.

JOHN C. BOWEN
U. S. District Judge.

Received a copy of the within Order this ..... day of October, 1936.

....., Attorney for Appellee.

O. K. as to form.

J. CHARLES DENNIS
U. S. Atty.
By F. A. PELLEGRINI
Asst.

Presented by
HOWARD W. HEDGCOCK
for Edward H. Chavelle,
Atty. for Petitioner.

Received a copy of the within Order allowing Appeal this 14 day of Oct., 1936.

J. CHARLES DENNIS,
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [17]

[Title of Court and Cause.]

STIPULATION RE TRANSMISSION OF ORIGINAL RECORD AND FILE OF DEPARTMENT OF LABOR.

It is hereby stipulated and agreed by and between EDWARD H. CHAVELLE, attorney for petitioner above named, and J. CHARLES DENNIS, attorney for respondent, Marie A. Proctor, United States Commissioner of Immigration, that the original file and record of the Department of Labor covering

the proceedings against the petitioner above named may be by the Clerk of this court sent up to the Clerk of the Circuit Court of Appeals, as a part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, that said original records may be transmitted as a part of the appellate record.

EDWARD H. CHAVELLE
Attorney for Petitioner.
J. CHARLES DENNIS
United States Attorney.
F. A. PELLEGRINI
Assistant United States Attorney.

Received a copy of the within Stipulation this 14 day of Oct., 1936.

J. CHARLES DENNIS
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [18]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD OF DEPARTMENT OF LABOR.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER, that the Clerk of the above entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, cover-

ing the deportation proceedings against the petitioner directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done this 14 day of October, 1936.

JOHN C. BOWEN
United States District Judge.

Received a copy of the within Order this ..... day of October, 1936.

J. CHARLES DENNIS
Attorney for Appellee.

O. K. as to form.
J. CHARLES DENNIS,
U. S. Atty.
F. A. PELLEGRINI,
Asst. U. S. Atty.

J. CHARLES DENNIS
Attorney for Respondent.

Presented by
HOWARD W. HEDGCOCK for
Edward H. Chavelle,
Atty. for Petitioner.

Received a copy of the within Order this 14 day of Oct., 1936.

[Endorsed]: Filed Oct. 14, 1936. [19]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above entitled case for appeal of the said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Return.
3. Decision.
4. Order denying writ.
5. Petition for appeal.
6. Notice of appeal.
7. Order allowing appeal.
8. Assignment of errors.
9. Citation.
10. Stipulation.
11. Order for transmission of original record.
12. This praecipe.

EDWARD H. CHAVELLE
Attorney for Appellant.

Received a copy of the within Praecipe this ..... day of October, 1936.

.....,
Attorney for Appellee [20]

Received a copy of the within Praecipe this 14 day of Oct., 1936.

J. CHARLES DENNIS
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [21]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss:

I, Edgar M. Lakin, Clerk of the above entitled Court, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 21, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the final decree and judgment denying writ, filed October 14, 1936, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Cicuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 39 folios at 15¢	$ 5.85
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript	.50
Certificate of Clerk to Original Exhibits	.50
Total	$11.85

I hereby certify that the above cost has been paid to me by the attorney for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court, at Seattle, in said District, this 21st day of October, 1936.

[Seal] EDGAR M. LAKIN,
Clerk United States District Court, Western District of Washington.

By
Deputy. [22]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss:

To: Honorable Marie A. Proctor, United States Commissioner of Immigration at the Port of Seattle, Greeting:

WHEREAS, Ng Fook has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately, to-wit, on the 14th day of October, 1936, rendered in the District Court of the United States for the Western District of Washington, Northern Division, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the City of Seattle, in the Ninth Circuit, this 14th day of October, 1936, and the Independence of the United States the one hundred and sixtieth.

[Seal] JOHN C. BOWEN
U. S. District Judge.

Received a copy of the within Citation this 14 day of Oct., 1936.

J. CHARLES DENNIS
Attorney for Respondent.

[Endorsed]: Filed Oct. 14, 1936. [23]

[Endorsed]: No. 8364. United States Circuit Court of Appeals for the Ninth Circuit. Ng Fook, Appellant, vs. Marie A. Proctor, United States Commissioner of Immigration at the Port of Seattle, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 26, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

NO. 8364

NG FOOK, Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle, Appellee

Brief of Appellant

FILED
DEC 2[illegible] 1936
PAUL P. O'BRIEN,
CLERK

EDWARD H. CHAVELLE,
Attorney for Appellant,
Seattle, Washington

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In the

United States Circuit Court of Appeals

For the Ninth Circuit

NO. 8364

NG FOOK, Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle, Appellee

Brief of Appellant

STATEMENT OF FACTS

This matter comes before the court upon an appeal from an order of the district court denying the appellant's application for a writ of habeas corpus.

The grandfather of the appellant, whose name is Ng Fun, was born in the Hawaiian Islands on August 12th, 1885. This fact was attested by a signed and sealed certificate made by the proper officers in the Hawaiian Islands, to the effect that the said Ng Fun was there born.

Subsequently, and prior to 1902, the said Ng Fun left the Hawaiian Islands and went to China, where, in the year 1902 there was born to him a son, the father of appellant, Ng Ming Yin. This is conceded by the government and he has made frequent and periodic trips from the United States to China and has returned without any question and has always been issued return certificate No. 430. The appellant, Ng Fook, is the son of Ng Ming Yin.

The records and files of the Immigration Service of the Department of Labor contain a copy of the pre-investigation of Ng Fun, the grandfather of the present applicant, San Francisco File No. 10082/3, which was made at the time of the application to enter the United States in 1905. The record from Honolulu incorporates as an exhibit in the case a duly certified and authenticated copy of birth certificate No. 837, dated September 4, 1901, executed by the Secretary of the Territory of Hawaii, which certifies that the grandfather was born in the Hawaiian Islands August 13, 1885. Letter of the Central Office No. 54388/206 of February 16, 1918, states that the evidence in the record reasonably establishes that NG MING YIN is the son of a native-born citizen.

The two primary questions presented to this court upon appeal can be summarized as follows:

1. The question of law presented as to whether or not Ng Ming Yin, born in 1902 in China, took the United States citizenship of his father, who was born in the Hawaiian Islands.

The government has contended that he did not take the citizenship of his father by reason of the fact that at the time of his birth the English common law rule applied, to the effect that a child born abroad of a father who was the subject of England would not take the nationality of his father.

Thus, the whole controversy as to the question of law turns upon this problem as to whether or not the common law rule is applicable to this case, so that NG FOOK could not have taken the citizenship of his father. It is contended by appellant, as more specifically appears in this brief, that the English common law rule does not apply in the case at bar.

2. Whether the Board of Special Inquiry was justified in basing its order of exclusion upon minor and trivial discrepancies in the record and relating only to collateral matters and not to the real issue of relationship, when all of the other testimony and records of the department in the case show a consistent agreement upon the facts having a bearing upon the relationship of the appellant to his father. The decision of the Board of Review which upheld the

Board of Special Inquiry, which is designated on the record as 55917/473, paragraph four of which reads as follows

> "As to the relationship, the alleged father claimed in April, 1921 to have as his oldest child such a son as this applicant. The alleged father who as noted above was last in China in 1931 has appeared to testify as the only witness on the applicant's behalf. The present testimony of the applicant and alleged father, while *showing considerable agreement*, disclosed several discrepancies for which no reasonable explanation consistent with the relationship here claimed has been suggested."

This particular extract from the decision of the Board of Review emphasizes the fact that the government from the beginning regarded the question raised by the appellant upon his application to enter the country, as purely one of law, and the Board of Inquiry regarded it as purely one of law; and it was not until the Board of Review, in its decision above quoted, upheld the Seattle office that the appellant was not entitled to enter the country, as a matter of law upon the admitted facts that the government then abandoned the position that the appellant should be barred as a matter of law and sought to make a case upon a question of fact, that is to say, they went through the records and seized upon minor and trivial discrepancies having no logical bearing to whether or not the appellant was the son of his fath-

er and proceeded to take the position that he was not, and from this time on have sought to bolster up the weakness of their case upon the question of law by this later acquired emphasis upon the question of fact.

It should be here pointed out that the only discrepancies which the government was able to disclose in the record were collateral matters and can be summarized as follows:

1. That the father smoked a pipe—the appellant said that he never smoked a pipe.

2. The appellant described the exact amount of space between the houses in the village a little differently than that of his father.

3. The appellant said that there is one photograph of his parents in the house and the father says that there is only a photograph of himself in the house.

ASSIGNMENTS OF ERROR

1. The Court erred in discharging the order of show cause herein.

2. The Court erred in finding that the petitioner was not a citizen of the United States and that he was not entitled to enter the United States as a citizen.

3. The Court erred in refusing to allow applicant a fair and impartial hearing.

4. The Court erred in discharging the order to show cause and denying petitioner's petition for a writ of habeas corpus.

ARGUMENT

For the convenience of argument, the principal issues raised in this case will be discussed separately, that is, question of fact as to applicant's relationship with father and, secondly, the question of law as to whether the appellant's father, who was born in China, took the citizenship of applicant's grandfather, who was born in the Hawaiian Islands.

Contentions of appellant can be separately stated.

1. That the appellant is the son of NG MING YIN.

2. That the father of appellant acquired the United States citizenship of his father (the appellant's grandfather, who was born in Hawaii) and that the father of the appellant acquired the United States citizenship of his father (the appellant's grandfather).

At the time this matter was heard before the Board of Special Inquiry of Seattle, it was impliedly conceded that the only question was one of law as

to whether or not NG MING YIN, who was born in China in 1902, took the United States citizenship of his father, NG FUN, who was born in Hawaii. The government then concluded, as it does now, that NG MING YIN did not take the citizenship of his father, by reason of the fact that at the time of his birth the English common law rule was that a child born abroad of a father who was the subject of England, did not take the nationality of his father. At the time of the hearing before the Board of Special Inquiry at Seattle, relied upon this contention. However, as events developed, and it became apparent to the government that their position of law was not as well taken as had been anticipated at first blush, the government immediately scrambled about to raise the question of fact, which had never occurred to them until they discovered their weakness upon the question of law. This undoubtedly accounts for the weakness of the government's case upon the alleged discrepancies and upon the question of fact of the appellant's relationship to his father, which will be discussed in the latter part of the argument.

The basis of the government's contention that the English common law applies, said rule being to the effect that a child born of a citizen in a foreign country does not take ctizenship of his father, is based solely upon Title 1, Chapter 1, Section 1, of the

Revised Laws of Hawaii, 1925 compilation, which were originally enacted in 1892. The particular provision upon which the government relies is as follows:

> "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Hawaiian Islands in all cases, * * *"

Now, it has been contended by the government that this was the complete wording of the statute at the time of the birth of the father of the applicant in 1902. The applicant contends, however, that the government has omitted an essential part from this statute, which was in effect at the time of the birth of the father of the applicant, which reads as follows:

> "* * * except as otherwise expressly provided by the Constitution and laws of the United States or by the laws of the Territory, or fixed by Hawaiian judicial procedure or establishment by Hawaiian usage; provided, however, that no person shall be subjected to criminal proceedings except as provided by the written laws of the United States or of said Territory."

It is the contention of the applicant herein that this latter provision was a part of the law in 1902, when the father of the applicant was born, although the compilation of the code from the original session laws, which are not available to the applicant, leaves some doubt as to the actual date when this latter part

was either added to or became concurrently a part of the above provision.

In any event, it is contended by the applicant that this is immaterial, due to the fact that under the annexation act which made the Territory of Hawaii a territory of the United States and set up the territorial government, the laws and Constitution of the United States automatically became a part of the organic law of the government of Hawaii, and therefore became a part of the Constitution of said government concurrently with the extension of the sovereignity of the United States over the Territory of Hawaii. Sectioon 5 of said Act provided:

> "That the Constitution, and, except as other wise provided, all the laws of the United States, including laws carrying out general appropriations, which are not locally inapplicable, shall have the same force and effect within the territory as elsewhere in the United States; provided, that Sections 1841 to 1891, inclusive, 1910 and 1912, of the Revised Statutes, and the amendments thereto, and an act entitled 'An act to prevent the passage of local or special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes,' approved July 13, 1886, shall not apply to Hawaii."

It is apparent that the laws of the United States with respect to citizenship in 1900 automatically became a part of the laws of Hawaii and that there has

been effective for many years an act with regard to children born to citizens without the United States, which was passed in 1802, with certain amendments in 1885. The statute as it existed from 1885 until 1907 will be found to be identical with the first sentence of 8 U. S. Code Annotated, Section 6; that is to say, that the latter sentences were added at or subsequent to 1907. The first sentence reads as follows:

> "Children of Citizens Born Outside the United States. All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of their birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States * * *"

Therefore, there can be no dispute about the fact that in 1902, the date of the birth of the father of the applicant, that under the laws of the Territory of Hawaii the father of the applicant automatically became a citizen of the United States, by reason of the fact that he was born the son of a citizen of the United States, regardless and irrespective of the fact that he was born in China.

Of course, the fundamental premise to all of the foregoing is that a person born and naturalized in the Hawaiian Islands automatically becomes a citizen of

the United States. Article 17, Sec 1 of Constitution of the Republic of Hawaii adopted in 1894 provides:

> "All persons born in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof;
>
> And further, all citizens of the Republic of of Hawaii under the annexation act of 1900, making the Hawaiian Islands, a territory of the United States, automatically become citizens of the U. S.

Section 4 thereof provides:

> "All persons who were citizens of the republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

The fact that the common law rule was not applicable at the time of the birth of the father of applicant, is evident upon a reading of a decision in 1902 by the Hawaiian Supreme Court:

> *U. S. of America vs. Ching Tai Sai*, 1 Hawaiian Reports 118.

In this particular case, two Chinese boys were born in the Hawaiian Islands at the time it was a kingdom, and it was admitted by them that they were born of a domiciled Chinese laborer. The Court here held that, irrespective of this, that they automatically became citizens of the Territory of Hawaii and

therefore citizens of the United States, by virtue of Article 17, Section 1, of the Constitution of the Republic of Hawaii, the Republic having been established immediately prior to the territorial government.

> "* * * that all persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

Quoting from the case:

> "In the Act of April 30, 1900 (Volume 31 U. S. Statutes, page 41), entitled 'An Act to provide a government for the Territory of Hawaii,' is prescribed by Section 4 thereof relating to the question of American citizenship of people of the Islands: 'That all persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight are hereby declared to be citizens of the Territory of Hawaii.' "

The Court further says:

> "Upon an examination of the Constitution of the Kingdom of Hawaii and the laws of same, I find nothing at the time of the birth of either of these boys defining the status of aliens domiciled within the Hawaiian Islands which would tend to throw any light upon the status of these defendants, *and the rules of international law will prevail in the absence of any special enactment in relation thereto, and the citizenship of the children follow that of the father, in this case a subject of China* (underling ours) were it not for the fact that the Constitution of the Hawaiian Islands provided in terms, that all persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction thereof are citizens of the Republic.' "

In other words, the Supreme Court of the Territory of Hawaii said that under the rules of law in the Territory of Hawaii with respect to the citizenship of children born of a father who was not a citizen of the Territory of Hawaii, that the English common law did not apply and the children did take the citizenship of their father, were it not for the constitutional provision which has already been referred to. This case indicates that even prior to the organic act, that according to Hawaiian usage and precedent, in matters of citizenship the English common law rule was not recognized. This is clear from the above opinion, when the court said:

> "* * * and the rules of international law will prevail in the absence of any special enactment in relation thereof, and the citizenship of the children follow that of the father * * *"

The government has heretofore relied on a decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of

> *Wong Fong vs. U. S.*, 69 Fed. (2d) 681 (1934).

In this particular case the petitioner relied upon Section 4 of the Act of 1900. The petitioner was born in 1894 in China, which, of course, was prior to the Annexation Act of 1900, which in any event incorporated the laws and statutes of the United States with respect to citizenship. Petitioner in that case was

born the son of a citizen of the United States, who became a citizen by virtue of the fact that all citizens of the Republic of Hawaii were made citizens of the United States at the time of the annexation of Hawaii, but was unfortunate in not being born subsequent to 1900. Had he been, he would have become a citizen of the United States, for the reason that at the time the statutes with reference to citizenship of persons born abroad of citizens of the United States provided that they automatically became citizens of the United States.

The applicant here, however, is more fortunate in that his father was born in 1902, of a citizen of the United States, and in this connection it should be further pointed out that the father has on numerous and repeated occasions returned to the United States, so as to bring him within the provisions of the statute (8 U. S. Code Annotated, 6) to the effect that the rights of citizenship shall not descend to children whose fathers have never resided in the United States.

In the case of

Hawaii vs. Mankichi, 190 U. S. 197.

the defendant was convicted of a crime before the date of the Annexation Act of 1900, but after the date of the territorial resolution of 1898, which de-

clared that the Republic of Hawaii was to be a territory of the United States. The defendant contended that in 1898 the Constitution and laws of the United States extended over the Territory of Hawaii, and that his conviction was not in conformity therewith. The Court however, decided that so far as he was concerned, the laws and Constitution of the United States extended over the Territory of Hawaii only at the time of the Annexation Act of 1900.

> "The laws of the United States shall have the same force and effect within said territory as elsewhere in the United States."

Thus, the Supreme Court of the United States has recognized the fact that in 1900, by virtue of the annexation act of that date, that the laws and Constitution of the United States, so far as they were not locally inapplicable, became the law of the Territory of Hawaii. It would follow that the laws with respect to citizenship in effect at that time automatically in 1900 became the laws of Hawaii with respect to citizenship.

THE RECORD SHOWS APPELLANT IS SON OF NG MING YIN

It was agreed in this case by the Board of Special Inquiry at Seattle that the question of discrepancies of fact were eliminated, and that one of the cleanest

cut questions of law that we would ever get in any case was presented. In other words, because of the personal contact, family resemblance, and the excellency of the record, there was no need for comment upon the facts. The Board of Special Inquiry urged the question of law in its memorandum, and still insists that the Board of Review has made a mistake in its ruling upon the law. The applicant presented his case to the Board of Review, and the Board of Review sustained the appeal, so far as the question of law was concerned, and then turned around and tried to make something out of nothing with regard to discrepancies which those who are in contact with the case realize is not the question here presented, which is strictly a question of law and not of fact. The Board of Review goes so far as to drag into the record three persons who had nothing to do with the record, in order to sustain their decision.

It may be that the Board of Review are wrong on their decision in the law, but everyone in personal contact with the case knows that they are wrong upon their decision upon the facts. There is no doubt in anybody's mind that has this information first hand, that the applicant is the son of the father. That really calls for no discussion. But there is, however, a very interesting question of law in the case, as to whether the father is a citizen, and, of course, if he

is not a citizen then the son is not a citizen either, but if the father is a citizen then the son is a citizen; and that depends entirely upon the statutes of the Territory of Hawaii, and it is upon the determination of the effect of those statutes which fully decides this question.

I am compelled, in view of the ruling of the Board of Review, which has shocked everyone connected with the case, to take up the questions of fact. Because of the mutual feeling in the matter of both sides of the case, eliminating the Board of Review, believing the facts as our senses have conveyed the information to us upon which we have made our decision, it is indeed difficult for either side, knowing full well the facts, to argue something that we do not believe belongs in it, but which has been injected into it by the unusual decision of the Board of Review.

It can scarcely be believed that anyone could read the record without coming to the definite conclusion that the applicant is the son and the father his father. There is no question of the relationship between the father and the son, and their testimony with regard to all the immediate members of the family, the home village, its peculiar surroundings, nearby village and market places, their own home—its location and exterior and interior, the school attended by

the applicant and its location, and the various inhabitants of the village, agree in every substantial respect. Very convincing testimony is given with regard to the presence in the home of a white dog, and the source from which that dog was obtained about five or six years ago; and with regard to other village animals there is similar agreement. The testimony is by no means stereotyped and it carries with it the ring of truth.

No one who had read the record with an unbiased mind could have denied the applicant his constitutional birthright of citizenship and deprived him of his liberty and incarcerated him in a detention station, because it was in their minds that he was not the son of the father and because the relationship did not exist; the only reason was because the law upon which the father relied for his citizenship did not give him that citizenship, and he was not by reason of the law a citizen of the United States, and therefore his son was not a citizen.

Taking up in detail the points raised by the Board of Review, the following may be said:

A. *Father's smoking while last in China.* Pp 2, 8, 15.

No reason can be imagined why the father should untruthfully claim that he is not addicted to the habit

of smoking. The boy, who was nine or ten years old at the time and who was almost constantly in school while his father was home, doubtless had seen his father on several occasions in the company of other men who were smoking Chinese tobacco in Chinese water pipes, and somehow got the impression that his father smoked along with the rest of them.

B. *Spaces between village houses.* Pp. 4. 10, 11 (2), 15.

Referring again to the convincing nature of the testimony of the applicant and his father concerning the village and its occupants and its surroundings, it seems highly probable, if not certain, that this discrepancy came about in the following manner. In the first examination applicant was not questioned at all about spaces between the houses in the different rows, but the matter was taken up this way: "Q. There are a set of blocks on the table before you. You are requested to arrange these blocks to show the location of each building in your village, together with any other items that are necessary." Then, according to the plain wording of the record, the applicant proceeded to do several remarkable things with the blocks, a description of which covers a quarter page close written. In the first place, he arranged the blocks "to show three rows of houses, with a house on each row, no space between the houses on each

row." Clearly this part of the record is erroneous. Judging from testimony given by the father and later given by the applicant, applicant's arrangement of the blocks must have shown three houses in each row, each block set tightly against the other, and thus representing "no space" between the houses. Then, according to the record, the applicant proceeded to show with the blocks, not only everything in the village but everything anywhere near the village., even showing the location of Sin Chung City eight or nine lis away. Of course the record is absolutely erroneous in this respect also; and probably what happened was that, after the applicant had laid out the village, the interpreter asked him a lot of questions and then the result of the use of the blocks and of the answers to these informal questions was incorporated in the record as though the blocks showed the whole thing.

The father's use of blocks (p. 10) indicated that there were spaces between the houses, and his testimony was to the effect that the houses were built about four feet apart. When the boy was reexamined on the proposition, he doubtless remembered the way he had arranged the blocks, firmly up against each other, and felt that he was committed to the proposition that there were no spaces, through the manner in which he had made use of the (to him) alto-

gether novel method of trying to tell about something.

C. *Photograph of Mother in house*, Pp. 5, 13, 15.

The unfairness of concluding that a material discrepancy exists with respect to this matter may best be illustrated by quoting testimony. Applicant: "Q. Did you ever see any photograph or pictures of any person kept on the walls of your home? A. Yes, there is one photograph of each of my parents in the sitting room framed about this size (indicated about 18-in by 12-in.). Q. Do you know when these photographs were made? A. Over 10 years ago, as I remember it; it was quite a while ago. Q. Was there ever a group photograph taken showing either of your parents with any of your brothers or yourself? A. No."

The father: "Q. Was there any photographs or pictures of any person kept on the wall of your house? A. Yes, I have a photograph of myself hanging in the house. Q. Was there ever a photograph of your wife kept in your house? A. No. Q. How large is this photograph of yourself? A. About this size (indicates 18-in by 24-in.). Q. You don't think that there ever was a photograph of your wife kept in house? A. No. Q. Were you ever photographed in company with any of your children? A. No."

Applicant: "Q. Was there a photograph of your mother kept in your house? A. No. Q. You told us

before there was a photograph of your parents kept in the sitting room of your house. A. Yes, there is a photograph of my mother in the house. Q. How long has that photograph of your mother been there? A. Long time, don't know how long. Q. Is it the same size photograph as that of your father? A. Yes."

It will be observed that when the applicant was asked the direct question as to a photograph of his mother he answered in the negative. But he was immediately told that he already committed himself to the contrary, and it was then he changed. It will be observed also that applicant's first answer, as recorded, might very well be the result of misunderstanding on the part of the interpreter or someone else, for in it he seems to have been talking about one photograph representing two people. It was only when, on his reexamination, he was charged with having asserted previously that a photograph representing both of his parents was hanging in the house, that he talked as though there were two separate photographs, each of the same size, one representing his father and the other representing his mother. Apparently in this connection, as with the preceding proposition, we have an illustration of the fact that applicant is one of those youngsters who thinks that if he once commits himself in a certain way he must

be consistent and remain committed. It is amusing to see how the Board, in reading the record, cannot properly interpret the testimony concerning the sitting room. They call it central room.

4. *Testimony of other persons outside of the record.*

It is of course the fact that in China you are probably born with a million cousins. There are only a few families, and anyone with a Chinese name as Wong, Lee, Fook, etc., is a cousin of his. It is not a relationship any more than all the Smiths and Browns and Joneses are related. But the Board of Review, to justify its decision, has written into the record something that has nothing whatsoever to do with it; that is, the entry of three Chinese into the United States in 1931 and 1932, which is no part of the record and could not be used.

The Board makes the statement that it is agreed that the three alleged cousins are members of applicant's family. There is no such agreement anywhere in the record. It is upon this false premise that they proceed then to state that those alleged cousins are members of the family, and that the testimony that two of them gave in entering this country upon their application should be taken as against the father and the son, whose relationship is so conclu-

sively established, and as against the other alleged cousin, who testified that the father was married. In other words, they go outside of the record to take the testimony of three people who came to the United States in 1931 and 1932, that is not in the record before us, and take the testimony of two of the people as against the third, because the third testified that the father of the present applicant was married. Then they proceed to set these two up against the father and the son, when they were not called as witnesses, either by the government or by the applicant, and there was no way of calling them as witnesses.

How you can take the testimony of someone without bringing him in and giving the person against him the opportunity of cross-examining, or affording some means of interrogation to ascertain what motives he had in stating an untruth about another when entering the country, is more than I can see. I never heard of such procedure and I don't believe anybody else ever did. It would be like the Judge on the bench saying that ten years ago he heard someone say that I was dishonest, and therefore he was going to use that against me as evidence, although no witness was offered in court as to that fact; or that five years ago, out of the whole mass of humanity living in the United States, that three men by the name of Smith arrived in China and stated at the time of their

arrival that I was not married; and because they had so stated in a proceeding strictly applicable to them five years ago that I was not married, it was used now as conclusive evidence of that fact.

There is no relationship between these people that came in 1931 and 1932 and the present applicant, because you cannot say that people who simply have the same family name are related, and that is the only link that connects them. The fact is that in this present record it appears that these people who came here in 1931 had moved away from the One Bing village a long time ago, and the reason why they attempted to testify regarding the One Bing village was because the One Bing village is a village of only nine houses, and these people, having moved into a large city, would have found it much more difficult to describe it, and therefore resorted to the easier way of testifying to the location of the houses and the occupants in the smaller village from which they had so long since moved, and testified as though they had never moved.

The testimony in the present record, however, is all consistent with regard to the houses and their occupants, but not consistent with the testimony in the cases of these people that moved away from the village so long ago, which is clearly disclosed by the record,

but undisclosed by the applicants, which caused the principal variation, and as a result of that variation the others naturally followed.

You will readily understand that we have nothing to do with these people that arrived in 1931 and 1932. We had no opportunity to examine them or cross-examine them. We do not know where they are or how to locate them, and they are in no way identified with us, and how the Board of Review can say that they know that the testimony given by these people in 1931 and 1932 is the truth, the whole truth and nothing but the truth, and that the testimony given in the present case is not the truth, is more than I can see. It is a virtual denial of the rights of the applicant and the testimony given by the said witnesses is outside of the record and cannot be fairly used as a part of this record.

The facts of the case bearing upon the question of relationship are established in so many minute details that the effect of the discrepancies above discussed is overwhelmed; and the evidence preponderates most distinctly in applicant's favor.

The very recent case of *Song Gook Chun vs. Marie A. Proctor*, decided by this court July 20, 1936, being cause No. 8098, is very similar to the case at bar upon the question of fact.

As has already been pointed out, the alleged discrepancies in the case at bar can be boiled down to three: (1) That the father smoked a pipe—the appellant said that his father smoked a pipe, and the father said that he never smoked a pipe. (2) That although the applicant describes correctly that there were nine houses in the village, three in each row, and a social hall in contiguous rows, he describes the exact amount of space between the houses a little different than the father. (3) That the applicant says there is one photograph of each of appellant's parents, and the father says that there is only a photograph of the father.

It has already been pointed out and conclusively establishes the relationship of applicant to his father.

In the *Wong Gook Chun* case, *supra*, there were far more discrepancies than in the case at bar and could be summarized as follows:

1. The question of whether a person by the name of Wong Fon and his family was a village neighbor of the appellant in that case. 2. Certain details as to a village neighbor, King Lai, and his family. 3. Whether the school house was alone by itself or located with the other houses in the village. 4. Certain details as to Hugh Lai and his family. 5. Certain details as to Me Gin and his family. 6.

Certain details as to Foo Lai and his family. 7. Certain details as to appellant's schooling. 8. Certain details as to the girls' house in the village. 9. Certain details as to cross-alleys in the village.

In this case the court refused to give any weight to such minor discrepancies, which had no relation to the issue. It may be here pointed out that the testimony of witnesses was in substantial accord. All things she was able to answer with reasonable accuracy as compared with other witnesses on the same points.

The record shows that all her answers were promptly given. It should be here noted that the Board of Review in the case at bar said:

> "* * * that all the testimony of the applicant of the alleged father, while showing considerable agreement, discloses several discrepancies."

It is important to note that the Board of Review recognized the consistency of the testimony, but merely concluded that, because of the minor discrepancies, it could not believe that the appellant was the son of Ng Ming Yin; and it should be further emphasized that the case at bar should be boiled down to three, as has already been enumerated.

Returning to the *Wong Gook Chun* case above, *supra*, the case continued:

> "As a result of the very searching examination to which each of the witnesses was subjected several discrepancies of a minor nature were brought out. The disagreements in the testimony are mainly on points with reference to the families of neighors and, consequently, unless establishing deliberate falsehood or untruthfulness, are of little significance upon the real point of relationship."
>
> "The father had been absent from his family for many years and he might have honestly been mistaken in this matter. This is not according the applicant a fair hearing, or awarding him justice."

The case at bar is very similar to the case of *Hom Chung vs. Nagle*, 41 Fed. (2) 126. In this case the applicant testified that the schoolhouse had five rooms and a pointed roof, and his father testified that the school house had only one room and a flat roof; the applicant's father testified that the cemetery was west of the village, that the road to the cemetery was wet, and that a single monument and stone covered the graves of his parents and that when at home he slept with his wife and baby; the applicant testified that the cemetery was in a different direction, that the road was dry, and that two monuments and two stones covered the grandparents' graves, and that he and his father slept together. In this case, in regard to such minor discrepancies, the court said:

> "In order to determine the effect of discrepancies between the testimony of the alleged father and his alleged son, it may be fairly assumed that the father is stating the facts concerning the village in which he resided in China as accurately as his memory permits him to do. If he has deliberately and wilfully sworn falsely to secure the admission of appellant into the United States, it is reasonable to assume that such perjury or falsehood is confined to the material fact of the appellant's relationship to him, and does not extend to immaterial details concerning the village in which he lived. Any erroneous statements that he may have made concerning the village or his home therein would have no tendency to discredit his testimony that the appellant was his legitimate son."

The Court further said:

> "If the applicant is from the same home and family, he would, of course, be from the same village, and it is altogether likely that he is the son he claims to be."

In the case of *Ng Yuk Ming vs. Tillinghast*, 28 Fed. (2) 547, C. C. A. 1, the discrepancies were also more serious than in the case at bar. In that case the court said:

> "The discrepancies relied upon by the immigration authorities relate to collateral matters, all of which are of such a trifling nature as to furnish a substantial evidence for reaching a contrary conclusion."

In the case of *Gung You vs. Nagle*, 34 Fed. (2) 848, C. C. A. 9, is a case similar to the case at bar. Quoting:

> "Thus the testimony of five witnesses given on different occasions when the subject was purely incidental to the matter under investigation confirms the ordinary course of nature. To reject this evidence under the circumstances would be equivalent to refusing to hear them at all, and would be a flagrant disregard of the fundamental principles for the administration of justice."
>
> (The five witnesses referred to mentioned the applicant at prior hearings).

The Court also said:

> "Evidence concerning the town or village is adapted to develop the question as to whether or not the applicant lived in the village, and thus in the home from which he claims to come, but discrepancies here must be of the most unsatisfactory kind upon which to base a finding of the credibility of a witness. * * * It would seem that the discrepancy in the testimony of a witness, to justify rejection of testimony, must be on some fact logically related to the matter of relationship and of such a nature that the error or discrepancy cannot reasonably be ascribed to ignorance or forgetfulness, and must reasonably indicate a lack of veracity."

It should be pointed out that in the case at bar the applicant testified in conformity with several other witnesses concerning a multitude of details actually relating to the question of his relationship to his father, and that the insignificant discrepancies heretofore referred to are the only ones upon which the immigration authorities were able to find any minor

differences, in spite of the fact that they cross-examined the applicant at length upon a wide range of questions and details, and matched his testimony against numerous other persons examined at different times.

CONCLUSION

It is respectfully submitted, in view of *Wong Gook Chun vs. Proctor, supra,* and the cases just cited, that the immigration authorities were unjustified in rejecting the testimony of the appellant which fully and clearly established the fact that he was related to the person claimed to be his father; and that the discrepancies were of such a minor and trifling nature and related only to collateral matters and not the real issue of relationship, as to make the action of the immigration authorities in rejecting the testimony establishing the relationship wholly unjustified and, in view of the premises, arbitrary and capricious.

Respectfully submitted,

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Attorney for Appellant

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 8364

NG FOOK,

Appellant

vs.

MARIE A. PROCTOR, as United States Commissioner of Immigration at the Port of Seattle,

Appellee

Upon Appeal from the District Court of the United States
For the Western District of Washington,
Northern Division

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant, NG FOOK, admits that he is a full blood person of the Chinese race and that he was born in China. He arrived from China at Seattle on February 1, 1936, and applied for admission into the United States as a citizen thereof by virtue of the claim that he was a foreign-born son of a citizen of this country. He failed to reasonably establish his claim and his application was denied by a

board of Special Inquiry. On appeal to the Secretary of Labor, Washington, D. C., the excluding decision was affirmed. Thereafter, a petition for a Writ of Habeas Corpus was filed in the District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the order of the District Court denying said petition.

According to the record testimony, the appellant was born in Ong Bing village, China, on September 19, 1920, and continued to reside in China until 1936. He says that NG MING YIN is the name of his father.

NG MING YIN says that he was born in Ong Bing village, China, on November 3, 1902. He came direct from China to San Francisco, arriving July 25, 1914, and was later admitted as a citizen, son of NG FUN, and has since been recognized by the Immigration Service as a citizen of this country.

NG FUN, the alleged grandfather of appellant is reported to have died in China. He claimed birth in Hawaii on August 13, 1885, and at various times testified that in company with his parents and other members of his family he left Hawaii in either 1891 or 1892, and that his parents never returned to Hawaii or American territory. He arrived from China

at Honolulu on May 12, 1899, and was later admitted into the United States.

ARGUMENT

On the citizenship phase of this case the real issue is whether NG FUN was ever a de jure citizen of the United States. If he was not a citizen of the United States no foreign born child of his could ever be a citizen of this country. This is fundamental and it is not deemed necessary to quote the law or any authority in support thereof.

The government of the Hawaiian Islands was a kingdom for many years prior to January 16, 1893, when Queen Liliuokalani was deposed. A provisional government was established on January 17, 1893, and the Islands remained under the provisional government until the Republic of Hawaii was proclaimed on July 4, 1894.

Article 17 of the Constitution of Hawaii, adopted July 4, 1894, reads:

> "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof."

The phrase "and subject to the jurisdiction of the Republic" was inserted in the Constitutional pro-

vision for some definite and substantial reason and unquestionably means what it says.

The term "subject to the jurisdiction" with reference to citizenship under the 14th Amendment to the Constitution of the United States, was defined by Justice Field in *Re Look Tin Sing*, 21 Fed. 905, Circuit Court, California, 1884, as "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, and with the consequent obligation to obey them when obedience can be rendered; and only those subject by their birth or naturalization are within the terms of the amendment."

In *Elk vs. Wilkins*, 112 U.S. P. 102, the Supreme Court said:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof. The evident meaning of these last words is, not merely subject in some respect or degree, to the jurisdiction of the United States, but completely subject to their political jurisdiction and owes them direct and immediate allegiance."

And in *Lem Moon Sing vs. United States*, 158 U.S. 538, 15 Sup. Ct., page 971:

> "The words of the statute are broad and include "every case" of an alien, at least every Chinese alien, who at the time of its passage is out of this country, no matter for what reason,

> and seeks to come back. * * * While he lawfully remains here he is entitled to the benefit of the guarantees of life, liberty, and property secured by the constitution to all persons, of whatever race, within the jurisdiction of the United States. * * * But when he has voluntarily gone from the country and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the government, as expressed in enactments of the law-making power."

In *United States vs. Wong Kim Ark*, 169 U.S. 649, the term under discussion means "within the limits and under the jurisdiction of the United States."

> "The domicile of an infant is the domicile of the father, if living, and if he is dead it is the domicile of the mother." *Lamar vs. Micou*, 112, U.S. 460 (1884).

"An infant cannot choose a residence." In *re Thorne*, 148 N.E. 630.

It is undisputed that NG FUN was not residing in the Hawaiian Islands at any time between 1891 and 1892 and May 12, 1899. Therefore, he was not subject to the jurisdiction of Hawaii and consequently did not and could not become a citizen of the Republic of Hawaii under the Constitution of Hawaii of July 4, 1894.

The Act of April 30, 1900, Section 4 (8 U.S.C.A. 4) reads:

> "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are declared to be citizens of the United States."

It is certain that NG FUN, not being a citizen of the Republic of Hawaii, did not derive American citizenship under the Act of April 30, 1900, and he did not begin to reside in the Territory of Hawaii until May 12, 1899. There is no law under which NG FUN could have derived American citizenship. It naturally follows that if NG FUN was never a citizen of the United States, his foreign-born son NG MING YIN is not a citizen of the United States, and likewise the appellant, born in China, could not derive American citizenship through an alien father.

Section 1109, Civil Laws of Hawaii in effect in 1896 and compiled in 1897, is quoted in full:

> "The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws."

It is immaterial that this law has been amended since annexation, as is urged on page 8 of appellant's brief, for the reason that the citizenship of NG

FUN is not determinable under the amendment. Citizenship rights and privileges created by the laws of the United States are not retroactive, unless expressly provided for. *Mock Gum Ying vs. Cahill*, 81 Fed. (2) 940 CCA9. Under the common law of England and the United States a person is a citizen of the country where born, and such person can only acquire citizenship in another country under a law of the other country. We quote from *Weedin vs. Chin Bow*, 274 U.S. 657, 47 Sup. Ct., p. 773:

> "The very learned and useful opinion of Mr. Justice Gray, speaking for the court in *United States vs. Wong Kim Ark*, 169, U. S. 649, 18 S. Ct. 456, 42 L.Ed. 890, establishes that at common law in England and the United States the rule with respect to nationality was that of the *jus soli*, that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and there could be no change in this rule of law except by statute; * * *."

The appellant cites *United States vs. Ching Tai Sai*, I Hawaii 118. This opinion relates to two boys who were born in the Kingdom of Hawaii. They were defendants in deportation proceedings subsequent to annexation and were not applicants for admission. Their father was absent from Hawaii but one year. The opinion admits that the common law of England and the United States that the place of

birth controls citizenship rather than the nationality of the father.

By a joint resolution adopted by Congress, July 7, 1898 (8 U.S.C.A. 293), known as the Newlands Resolution, it was provided:

> "There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States."

Aliens resident in the Hawaiian Islands prior to annextion on August 12, 1898, are subject to deportation for cause after the Islands became American territory. *Tama Miyake vs. United States*, 257 Fed. 732 C.C.A.9.

Section 1993, R. S. (8 U.S.C.A.6):

> "All children born out of the limits and jurisdiction of the United States, whose fathers may be at the time of birth citizens of the United States, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States. * * *."

The appellant has no right of American citizenship under this section for the reason his alleged father or grandfather were never citizens of the United States. The Constitution and laws of the United States were extended to the Hawaiian Islands by

the Act of April 30, 1900 (48 U.S.C.A. 495). Section 1993 R. S. is not retroactive. It is inconceivable that a child born in China prior to August 12, 1898, to a Chinese citizen of Hawaii could claim any right under said Section.

Our laws relating to citizenship are restrictive and strictly interpreted when dealing with those of the Chinese race. For instance, the war-time naturalization Act of 1918 provided that any alien who served with the armed forces could be naturalized without filing a declaration of intention and the five-year residence was waived. In construing the Act in *Hidemitsu Toyota vs. United States*, 268 U. S. 402, the Court held that the term "any alien" did not include persons of the Chinese race. On November 13, 1922, the Supreme Court in *Takao Ozawa vs. United States*, 260 U.S. 178, said that the naturalization of Chinese was prohibited since the Act of 1790. And see *Mock Gum Ying vs. Cahill*, 81 Fed. (2) 940 C.C.A.9. In the latter case the applicant for admission claimed to be a child of an American born Chinese mother and an alien Chinese father, married in this country. The applicant did not derive American citizenship through the mother (but could through a citizen father). The excluding decision was sustained. It appears that a brother and a sister were

previously admitted to the United States, and we quote from the same case the following paragraph with special reference to the fact that the alleged father of the appellant was admitted to the United States as a citizen through error or mistake in interpreting the law:

> "The fact that appellant's brother and sister, also born in China, were admitted to the United States as citizens, proves nothing, except that, in admitting them, the immigration authorities made a mistake which, if possible, should be corrected, not repeated."

The general policy of Congress is expressed in the Act of July 1, 1902, No. 4, C. 1369, 32 Stat. 691, 692, when it declared that all inhabitants continuing to reside in the Philippine Islands who were Spanish subjects on April 11, 1899, and then resided in the Islands and their *children born subsequent thereto*, shall be deemed and held to be citizens of the Islands, but not of the United States. This provision excludes foreign born non-resident children born prior to April 11, 1899. In the absence of any law to the contrary we must presume that it was the intention of Congress in assuming jurisdiction over the Hawaiian Islands to limit citizenship to those only who were bona fide citizens of the Islands on August 12, 1898. The Constitution of Hawaii,

supra, does not declare non-resident foreign born children to be citizens, and the Act of April 30, 1900, supra, does not enlarge the scope of the Constitution of Hawaii to include foreign-born non-resident children, friends or relatives.

The attention of the Court is invited to the case of Lum Sing who was naturalized in the Kingdom of Hawaii on August 3, 1892, and as he lived continuously in the Islands had the same citizenship status as native Chinese who acquired citizenship under the Constitution of the Republic of Hawaii and the Act of April 30, 1900. In 1910 his two alleged sons born in China prior to 1898 applied for admission at Honolulu. In considering the merits of the case the Court said:

> "It is clear, therefore, that, even if Lum Sing was naturalized as he claims to have been, and if the petitioners are in fact his sons, they are not citizens of the United States. They were never citizens of the Kingdom of Hawaii, for there was no provision in the law under which Lum Sing claims to have been naturalized by which Hawaiian citizenship acquired by naturalization would have extended to non-resident alien children. Nor were the petitioners made citizens by the terms of Section 4 of the organic act (31 Stat. L. 141)." In *re Koon Ko*, 3 Dst. Ct. Hawaii, 623 (8 U.S.C.A.4).

Under the Constitution of the Republic of Hawaii of July 4, 1894, the political status of a Chinese

born or naturalized in Hawaii prior to July 4, 1894, is the same. Such Chinese continuing to reside in the Islands and those born in the Islands during the Republic became citizens of the United States on August 12, 1898.

The law feature of this case is similar to *Wong Foong vs. United States*, 69 Fed. (2) 681 C.C.A.9, and believed to be controlling here. The alleged father, Wong Ping, was naturalized in the Kingdom of Hawaii on August 29, 1892. On May 11, 1893, he departed for China on a temporary visit and returned to Honolulu on July 9, 1900, and was admitted to the mainland at San Francisco in 1907 as an American citizen. He was not subject to the jurisdiction of the Republic for the reason he was residing in China during the life of the Republic, and, therefore, did not become a citizen of the Republic of Hawaii under the Constitution of Hawaii of July 4, 1894, and consequently did not become a citizen of the United States at time of annexation on August 12, 1898, under the Act of April 30, 1900 (8 U.S.C.A. 4). The Court held that Wong Foong was not a citizen of the United States and affirmed the exclusion order. The opinion cites *Betty vs. Day*, 23 Fed. (2) 489 C.C.A.2 and *United States vs. Corsi*, 55 Fed. (2) 941 C.C.A.2, in re minor children of the Caucasian

race claiming American citizenship through the naturalization of their fathers. The cited cases could have no application to Chinese as the naturalization of Chinese is prohibited. To be a citizen of the United States, a Chinese must be born under the American flag, or if foreign born must be at birth a child of a citizen of the United States who has previously resided in the United States. *Weedin vs. Chin Bow*, 274 U.S. 657, 47 Sup. Ct., 772. The citizenship of foreign born Chinese seeking admission to this country as children of American citizen Chinese is not determined by age or minority.

It is here contended that the appellant's alleged father, NG MING YIN, was never a citizen of the United States and that his admission as a citizen by the Immigration authorities was and is erroneous and contrary to law. Such admission is not an adjudication and is not binding on the government now.

Kaoru Yamataya vs. Fisher, 189 U.S. 86,
White vs. Chan Wy Sheung, 270 Fed. 765 CCA9,
Weedin vs. Ng Bin Fong, 24 Fed. (2) 821 CCA9,
Jung Yen Loy vs. Cahill, 81, Fed. (2) 809 CCA9,
Mock Gum Ying vs. Cahill, 81 Fed. (2) 940 CCA9.

The claim of the alleged grandfather of appellant, NG FUN, that he was born in Hawaii, or that

he departed therefrom when a boy, is seriously doubted. Exhibit 10072/3 contains a copy of birth certificate presented by NG FUN in 1905. The said certificate is *nunc pro tunc* in form and was issued by the Secretary of the Territory of Hawaii under date of September 4, 1901, No. 837, and states that NG FUN was born in the Hawaiian Islands on August 13, 1885. A similar certificate was knocked out in *Lee Leong vs. United States*, 217 Fed. 48, C.C.A.9, and it is apparent that the issuance of such a certificate was a technical violation of law, from which we quote:

> " * * * Provided, however, that the registrar shall keep a separate record of all births reported later than six (6) months after the date of said birth, which record shall not be admissible as evidence of any statement therein made, nor shall any certified copy of such record or any part thereof be furnished by the registrar." Section 1215 Hawaiian Laws, 1896, C. 50, S. 5.

Exhibit 31075/4-15 contains a report of Immigrant Inspector J. L. Milligan, dated at Honolulu August 12, 1914, in re record of landings and departures of NG FUN, with the information that no record of his first alleged departure could be found, which indicates that NG FUN was never in the Islands prior to May 12, 1899, at which time he arrived from China.

RELATIONSHIP. NG FUN, the alleged grandfather claims to have been born on August 13, 1885. NK MING YIN says that he was born in China on November 3, 1902, and the appellant claims to have been born in China on September 19, 1920. If the testimony is true it means that NG FUN must have been married before he was 16 years and 9 months old. NG MING YIN, the alleged father of appellant, claims five sons and no daughters, which is quite common in this class of cases, thus laying the foundation to bring Chinese boys to this country in the future, and says that he never heard of a daughter being born in China to an American citizen Chinese.

Exhibit 12016/949 contains the record of NG AH PARK who applied for admission in 1916. He was found to be fraudulent and was excluded. NG FUN, the alleged grandfather of appellant, testified that NG AH PARK was his brother. NG FUN is discredited. *Ngai Kwan Ying vs. Nagle*, 62 Fed. (2) 166 C.C.A.9.

Exhibit 31075/4-13 is the record of NG MING YIN, alleged father of the appellant, originally admitted to this country in 1914. He has since made three trips China, and returned to this country the last time December 1, 1931. Both he and the ap-

pellant claim birth in Ong Bing village, China, and NG MING YIN says that while in China he always lived in the same house with the appellant. Therefore, both should be familiar with their alleged home village, which they say consists of nine houses and a social hall.

The appellant says that during his father's last trip to China he smoked a water pipe, using Chinese tobacco, several times a day. The alleged father was absent from the United States from March 29, 1929, to December 1, 1931, and says that he never smoked a cigar, cigarette, pipe, anywhere and that he did not smoke anything when home last. This discrepancy is satisfactory evidence that the appellant and his alleged father did not live in the same house as claimed.

The appellant and his alleged father are in agreement that there are nine houses in their alleged village, three on each row, and a social hall on a contiguous row. The applicant says there is no space between the houses on any of the rows; and upon re-examination testified that it is impossible to walk between the houses and that no person could insert a lead pencil between any of the houses on any row of his village. The alleged father was asked if there was any space between the houses on each

row and indicated that there was a space of four feet between the houses and testified that he could walk between the houses on each row. The appellant and his alleged father described the location of each building in the village through the use of blocks, and in addition both testified concerning the location of the buildings and whether there was a space between the houses on each row and the appellant was re-examined following the testimony of his alleged father. The test was fair and the principals were given full opportunity to agree. This discrepancy is clear cut and is, per se, fatal and is sufficient to show that the relationship claimed is false. *Hong Tong Kwong vs. Nagle*, 299 Fed. 588 C.C.A.9; *Weedin vs. Chin Share Jung*, 62 Fed. (2) 569 C.C.A.9.

The appellant says that there is one photograph, about 18 x 20", framed, of each of his parents, made about ten years ago, kept in the sitting room of his house. On re-examination he stated that there was a photograph of his mother in his house which had been there a long time and was of the same size as his father's photograph. The alleged father says there is a photograph of himself kept in his house but that there never was a photograph of his wife kept in his house. Such a discrepancy was held material in *Hom*

Dong Wah vs. Weedin, 24 Fed. (2) 774 C.C.A.9; *Haff vs. Der Yam Min*, 68 Fed. (2) 626 C.C.A.9.

Exhibits 149-450, 165-14 and 165-788 contain record of examinations of NG LEONG, who arrived January 12, 1931, NG FOO, who arrived October 15, 1931, and NG QUAY, who arrived in this country July 21, 1932, all being admitted as sons of NG YING, alleged brother of appellant's alleged grandfather. The said three applicants claimed birth in Ong Bing village in 1917, 1918, 1920, respectively, and described the village precisely as does the appellant, stated they attended school in the home village and that they lived in the second house on the third row. NG QUAY testified in 1932 that NG MING YIN (appellant's alleged father) was living in the United States and never saw him. NG FOO and NG LEONG testified in 1931 that NG MING YIN was not married. The appellant and his alleged father deny all knowledge of the said three boys, and the appellant who is about the same age as the three boys, and should have attended school with them, if the relationship were bona fide, says that no school was conducted in his village. If NG YING and his three sons testified truthfully it naturally follows that the appellant is not a son of his alleged father. The record shows that NG YING and NG

FUN claimed to be blood brothers, and this claim of relationship was not concocted by the Immigration authorities as is stated on page 23 of appellant's brief. If they are brothers as they claimed to be all their children are related by blood. It was held in *United States vs. Eng Sauk Lun*, 67 Fed. (2) 307 C.C.A.10 that persons related by blood are competent to testify concerning the birth and history of a relative.

The appellant, in attempting to destroy the testimony of NG YING and his three sons, beginning on page 23 of his brief says that the records NG YING and his three sons are no part of the record but later concedes that the said records are a part of the present record, and it is alleged that the three boys moved from Ong Bing villege a long time ago to a large city in China before coming to the United States; that he has had no opportunity to examine them; and that their testimony cannot be fairly used now. The three boys are about the same age as the appellant and since they claim to have lived in Ong Bing village and attended school in the same village before coming to this country in 1931 and 1932 they should have been in a position to know the complete family history of the appellant, — if the appellant lived in the same village, and he did claim. If the

three boys or their father were called to testify in this proceedings there is no reason to believe they would contradict their previous testimony. If the appellant or his counsel were not satisfied with the status of the record it was their duty to have the case reopened for the reception of testimony of any witnesses desired. *Fong On vs. Day*, 54 Fed. (2) 990 C.C.A.2; *Li Bing Sun vs. Nagle*, 56 Fed. (2) 1000 C.C.A.9. Strict rules of evidence are not applicable to Immigration hearings and the administrative authorities are entitled to "receive and determine the questions before them upon any evidence that seems to them worthy of credit." *Fong Kong vs. Nagle*, 57 Fed. (2) 138 C.C.A.9. In *Tang Tun vs. Edsell*, 223 U.S. 673, 32 Sup. Ct. p. 363, in considering the right of the Immigration authorities to receive in evidence other records of Chinese remotely related said:

> "Of these the Secretary might at all times take cognizance, and it would be extraordinary indeed to impute bad faith or improper conduct to the executive officers because they examined the records, or acquainted themselves with former official action."

In practically every case of a Chinese applicant for admission there is a multitude of agreement between the witnesses. Regardless of how well the

fraudulent cases are coached one or more substantial discrepancies is sufficient to explode the relationship claimed. See *Haff vs. Der Yam Min*, 68 Fed. (2) 626 C.C.A.9; *Wong Shong Been vs. Proctor*, 79 Fed. (2) 881 C.C.A.9.

There is evidence of considerable fraud in this case, some of which is traceable to the appellant's alleged grandfather when he testified for and attempted to land in this country an alien Chinese claimed to be a brother. The scriptures teaches us that the iniquities of the father descends to future generations. The appellant and his alleged father are not in a position to demand that the Immigration authorities believe them against the prior testimony of NG YING and his three admitted sons.

LAW AND AUTHORITIES

Section 23 of the Immigration Act of 1924 (8 U.S.C.A. 221) places the burden of proof upon applicants of all classes for admission into the United States. Additionally, under the Chinese Exclusion laws Chinese applicants are required to prove right to enter, and the Immigration officials are not required to show they are not admissible. *Mui Sam Hun vs. United States*, 78 Fed. (2) 615 C.C.A.9; *Lee Bow Sing vs. Proctor*, 83 Fed. (2) 546 C.C.A.9.

Section 17 of the Immigration Act of February 5, 1917, (8 U.S.C.A. 153) provides that Boards of Special Inquiry shall have authority to determine whether applicants for admission shall be allowed to land or shall be deported and that

> " * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of a Board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor; * * *."

The law in such cases is well settled. Findings of fact by the administrative officers, if supported by any substantial evidence, after a fair hearing, are final and binding on the courts, and in such cases no issue of law is raised before the court. *Dea Ton vs. Ward*, 82 Fed. (2) 223 C.C.A.1; *Jung Yen Loy vs. Cahill*, 81 Fed. (2) 809 C.C.A.9.

> "In considering the evidence, it is not sufficient that we might have reached a different decision." *Lum Sha You vs. United States*, 82 Fed. (2) 83 C.C.A.9.

> "Even if we were convinced that the Board's decision was wrong, if it were shown that they had not acted arbitrarily, but had reached their conclusions after a fair consideration of all the facts presented, we should have no recourse. 'The denial of a fair hearing cannot be estab-

lished by proving that the decision was wrong.' " *Jung Yen Loy vs. Cahill*, 81 Fed. (2) 809 C.C.A9.

The immigration officers are exclusive judges of weight of testimony and credibility of witnesses appearing before them, and there is no indication of unfairness if a witness is not believed. *Mui Sam Hun vs. United States*, 78 Fed. (2) 612 C.C.A.9; *Jew Hong Sing vs. Tillinghast*, 35 Fed. (2) 559 C.C.A.1.

CONCLUSION

The gist of the appellant's claim to American citizenship is based on the assumption that his alleged grandfather, NG FUN, was born in the Hawaiian Islands, became a citizen of the Republic of Hawaii and later of the United States, and that his alleged father NG MING YIN born in China derived American citizenship through the grandfather. It is certain that the alleged grandfather was not subject to the jurisdiction of Hawaii when the Islands went under the jurisdiction of the Republic of Hawaii on July 4, 1894, and there is no statutory authority under which he was entitled to claim American citizenship. His alleged descendants born in China are aliens. Even if NG FUN and his alleged son NG MING YIN were held to be citizens of the United States the discrepancies are sufficient to prove

that the appellant is not a son of NG MING YIN. The appellant was given a fair hearing, and the hearing was lawfully conducted. No evidence offered by the appellant was omitted. It is not shown that the hearing was unfair or improperly conducted or that there was any abuse of the discretion vested in the Immigration authorities, or that he was deprived of any of his rights to due process of law. Therefore, the excluding decision is final and conclusive insofar as questions of fact are concerned. The law questions of citizenship is answered by *Wong Foong vs. United States*, 69 Fed. (2) 681 C.C.A.9. The District Court did not commit error in denying the Writ of Habeas Corpus and its judgment should be affirmed.

Respectfully submitted:

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(On the Brief)

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 8364

NG FOOK,

Appellant,

vs.

MARIE A. PROCTOR, United States Commissioner of Immigration at the Port of Seattle,

Appellee.

Reply Brief of Appellant

FILED

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STATEMENT OF THE CASE

As the counsel for the appellee have multiplied, the original question in this case has been lost. It started out as a clean-cut question of law. The reason why the appellant was denied admission as the son of a citizen was, of course, that both the citizenship of the father and the son were at issue as a matter of law.

The decision of the Board of Review upon appeal from the Board of Special Inquiry, in determining this question, was as follows:

> "As to the citizenship of Ng Ming Yin. (Who is the father of the citizenship applicant.) The record shows that he was admitted as a citizen son of Ng Fun *who was conceded to be a native of Hawaii* on July 25, 1914. In February, 1918, he was issued a citizen's return certificate and readmitted on return from a trip to China in April, 1920. Again in October, 1921, and March, 1928, he was issued citizen's return certificates and readmitted as a citizen in September, 1924, and December, 1931. The ground for the present refusal to recognize Ng Ming Yin as a citizen is that his father Ng Fun while as the record indicates he was born in Hawaii in 1885 was in China between 1891 and 1899. The theory of the Seattle office appears to be that Ng Fun being in China in 1894 at the time that the Constitutional provision was enacted, of which the wording is 'all persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof,' was not made a citizen by that enactment because being in China he was not then subject to the jurisdiction of the Hawaiian Republic. On this theory the examining officer at Seattle states that 'whether Ng Fun was born in Hawaii is immaterial.' The Board of Review does not agree with the position taken by the Seattle office but on the contrary regards the Hawaiian nativity of Ng Fun as the material factor in the case and considers that his temporary physical absence in China in the years between 1891 and 1899 did not remove him from the jurisdiction of the Republic of Hawaii in the absence of any showing that he

> nenounced his allegiance to Hawaii. Thus it is not believed that the denial of the citizenship of Ng Ming Yin, the present applicant's alleged father, is warranted by the evidence."

The counsel insists that *Wong Foong vs. United States*, 69 F. (2d) 681 (C.C.A. 9), is controlling here. Again counsel leaves out the important question of fact in his statement, namely, the date of the birth of Wong Foong. He was born in China in 1894, which, of course, was prior to the Annexation Act of 1900, incorporating the laws of the United States with respect to citizenship. It is evident that had the petitioner been born subsequent to the Act of April 30, 1900 (8 U. S. C. A. 4) he would automatically have become a citizen of Hawaii by reason of the fact that at the time the statute provided that persons born abroad of citizens of the United States automatically became citizens of this country. However, the present case presents an entirely different question of fact because the father of Ng Fook, the present applicant, was born in 1902 and by reason of the Annexation Act became a citizen of the United States. This was recognized by the immigration authorities and they on repeated occasions admitted the father so as to bring him within the statute (8 U. S. Code Ann. 8) to the effect that the right of citizenship shall not descend to children whose fathers have never resided in the United States.

Respondent refers to Title 1, Chapter 1, Section 1, of the revised laws of Hawaii, 1925 compilation, which were originally enacted in 1892, to the effect that the common law of England is declared to be the common law of Hawaii, but merely states that the amended portion of the provision, which it is contended by the applicant, is a part of the law of 1902, when the father of applicant was born, has no bearing on the present issue. However, the argument of the appellee as to why it is not applicable is hard to follow.

The appellee cites Article 17 of the Constitution of Hawaii which reads:

> "All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic, are citizens thereof,"

and takes the position that "subject to the jurisdiction" means actual residence.

The appellee cites the case of *In re Lock Tin Sing*, 21 Fed. 905, and quotes from it to the following effect:

> "They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their laws, with a consequent obligation to obey them when obedience can be rendered; and only those subject by their birth or naturalization are within the terms of the amendment."

Extracting a portion from an opinion, such as appellee has done means nothing. A careful examination of the case, and a reading of the opinion will show that "subject to the jurisdiction" has nothing to do with the question of residence. In this particular case, the question of the citizenship of a person born in the United States of Chinese parents arose, and it was contended by the government that a person so born was not "subject to the jurisdiction" under the Fourteenth Amendment to the Constitution of the United States. In addition to the extraction which is quoted by the appellee, Justice Field said:

> "So profoundly convinced are we of the rights of these people from other countries to change their residence and allegiance, that, as soon as they are naturalized they are deemed entitled, with the native born, to all the protection which the government can extend to them, *wherever they may be, at home or abroad* (Italics ours), and the same right which we accorded to them to become citizens here is accorded to them, as well as to the native born, to transfer their allegiance from our government to that of another state."

Justice Field goes on to state that a person once having acquired citizenship becomes subject to the jurisdiction of the United States, and does not lose it, unless he renounces it. There is no contention in this case that anybody renounced any citizenship

which they may have acquired to the United States. Regarding this, the court continues:

> "So, therefore, if persons born or naturalized in the United States have removed from the country, and renounced in any of the ordinary methods of renunciation their citizenship, they henceforth ceased to be subject to the jurisdiction of the United States."

The next case that counsel cites is that of *Elk vs. Wilkins*, 112 U. S. 94, 102, but a careful reading of this case does not support any such statement that "subject to the jurisdiction" used in any sense means residence. That was a case in which the question of certain Indian tribes came into question by reason of the application of the Fourteenth Amendment to the Constitution, which provides to the effect that all persons born or naturalized in the United States are citizens thereof.

It should be noted in passing that Article XVII of the Constitution of Hawaii follows almost the exact words of the Constitution of the United States.

In the case last cited, involving a member of a hostile tribe of Indians, it was held that the Fourteenth Amendment did not make the members of that certain tribe citizens for the reason that that tribe was hostile and was not subject to the jurisdiction of the United States, *even though said tribe*

was within the territorial limits of the United States.

The court also laid down another exception to the rule that a person may not be subject to the jurisdiction of the court, even though within the territorial limits, as in the case of foreign diplomats and consuls. Thus, the case of *Elk vs. Wlkins* does not sustain the contention of the Board of Special Inquiry that "subject to the jurisdiction" means residence. The case goes further to prove this point, showing that a person may not be "subject to the jurisdiction" even though he may reside within the territorial limits of the country, by reason of belonging to a hostile tribe of Indians who had not submitted to the sovereignty of the United States government.

The appellee then cites the case of *Lem Moon Sing vs. United States*, 158 U. S. 538, 15 Sup. Ct., page 971. In that case the decision does not refer to a citizen of the United States, but to one who is admittedly a Chinese alien, and merely establishes a principle of law governing the rights of Chinese aliens to enter the United States, a principle which is thoroughly established and has no application to the present question, which involves a citizen of the United States.

Counsel further refers to the case of *Wong Kim Ark vs. U. S.*, 169 U. S. 649 (1897). This case also refutes the contention of the common law of England to the effect that children born abroad of a father who is a citizen do not take the nationality of the father. The court, referring to the common law, on page 672 of the decision, says that the United States Constitution refused to establish this rule, and refers to the Constitution and Statutes of the United States, which have abolished this rule. It should be noted that such statutes were in effect at the time of the birth of Ng Ming Yin, father of citizen applicant. In 1902 by Act of Congress, citizens of the Republic of Hawaii were made citizens of the United States. See 8 U. S. C. A., Sec. 3.

The case of *Wong Kim Ark* also established the rule that under the Fourteenth Amendment to the Constitution of the United States, any person within the territorial limits of the United States becomes thereby a citizen, and the case further holds that notwithstanding the laws which make it impossible for a Chinese person to become naturalized, yet a Chinese can become a citizen by being born in the United States.

Thus, the contention of the appellee that neither the father nor the grandfather were ever *de jure* citizens of the United States is without foundation.

Regarding the question of the applicability of the English common law, as explained in the original brief of appellant, regardless of Title 1, Chapter 1, Section 1 of the Revised Laws of Hawaii, 1925 compilation, in any event Section 5 of the Constitution of the Territory of Hawaii, which was enacted in 1900, and which was before the date of the birth of the father of the citizen applicant, conclusively wipes out any contention which can be made that the English common law is applicable to this case, by reason of the fact that under such act the laws of the United States are made a part of the laws of the Territory of Hawaii, including the laws with respect to citizenship.

It seems to me that in view of the fact that the Board of Review decided against the Board of Special Inquiry upon this question and found that the theory of the Board of Special Inquiry was erroneous reversing it as follows:

> "whether Ng Fun (grandfather of citizen applicant (paragraph ours) was born in Hawaii is immaterial. The Board of Review does not agree with the position taken by the Seattle office but on the contrary regards the Hawaiian nativity of Ng Fun as the material factor in the case and considers that his temporary physical absence in China in the years between 1891 and 1899 did not remove him from the jurisdiction of the Republic of Hawaii in the absence of any showing that he renounced his allegiance to

> Hawaii. Thus it is not believed that the denial of the citizenship of Ng Ming Yin, the present applicant's alleged father, is warranted by the evidence."

and that the finding of the Board of Review is binding upon the Board of Special Inquiry, that the matter cannot be argued again either in the District Court or in this Court. The matter having been finally determined so far as the Board of Special Inquiry is concerned by the Board of Review, they are now attempting to try out the same question again.

The appellee quotes from the Constitution of Hawaii, the Act of April 30, 1900, Sec. 4 (8 U. S. C. A. 4):

> "All persons who were citizens of the Republic of Hawaii on August 12, 1898, are declared to be citizens of the United States."

and then proceeds to state the conclusion that the grandfather of the citizen applicant was not a citizen of the Republic of Hawaii and did not derive American citizenship under the Act of April 30, 1900, although the grandfather, Ng Fun, was born there, and there is no dispute about the place of his birth, it being established by a duly authenticated certificate, namely, a birth certificate executed by the Secretary of the Hawaiian Islands, showing that Ng Fun was born in the Hawaiian Islands on August 13, 1885. This is the only evidence in the record touch-

ing this question one way or another. It is a well recognized rule as to hardly require citation that the certified certificate of a public officer as to matters under his jurisdiction and in the province of his office is *prima facie* evidence of the facts therein stated, and is admissable in any court in the land to prove the facts therein stated, and may be introduced in evidence regardless of the fact that the parties have testimonial knowledge of the facts therein stated. Such documents, bearing the seal of the government, are never considered hearsay, but are admissable without the testimony of the parties having knowledge of the facts therein stated. Such documents are the best kind of evidence, and are so recognized by all of the courts of the land, and where a party has in his possession such a certificate of a public official, bearing the seal of said official, it is not necessary to call the party having testimonial knowledge of the facts therein stated to prove said facts to any court, and by so doing the right of cross-examination is not afforded to a party disputing the truth of the facts therein stated. The reason for this rule is that the courts regard such certificate as the highest type and best evidence to prove the facts therein stated, and under such circumstances the right of cross-examination can be dispensed with. See Jones "On Evidence," Section 510, and also Sec-

tion 508 where it is said regarding such certificates as evidence:

> "Such entries are generally made by those who can have no motive to suppress the truth, or to fabricate testimony. Moreover, in many cases they are made in the discharge of duty, pursuant to an oath of office."

With this certified certificate of the birth of Ng Fun in Hawaii in the record, counsel deliberately proceeds to state that:

> "It is certain that Ng Fun, not being a citizen of the Republic of Hawaii, did not derive American citizenship under the Act of April, 1900, and he did not begin to reside in the Territory of Hawaii until May 12, 1899."

It is apparent that this is not a mistake that counsel has inadvertently made as to the residence of Ng Fun in Hawaii, because he was born there in 1885 and resided there until 1891 and he again returned in 1899. He has always been conceded to be a citizen of the United States. Counsel then says that because he has declared that Ng Fun is not a citizen of the United States, his son Ng Ming Yin is not a citizen. The record in this case shows that he was admitted as a citizen son of Ng Fun on July 25, 1914. In February, 1918, he was issued a citizen's return certificate on return from a trip to China. In April, 1920, and again in October, 1921, and March, 1928, he was issued citizen's return certifi-

cates. In September, 1924, and December, 1931, he was also admitted as a citizen.

The sole ground for the refusal to admit the citizen applicant is that his grandfather, Ng Fun, happened to be absent from Hawaii, the place of his birth, between 1891 and 1899.

Counsel then proceeds to cite Section 1109 of the Civil Laws of Hawaii in effect in 1896, although these laws have been amended since annexation, as we have urged in our brief on page 8.

Until the writing of the present brief, the argument has always been that Ng Fun was not even born in the Hawaiian Islands. Counsel then proceeded to argue in the face of the documentary evidence that even though Ng Fun was born in the Hawaiian Islands, that fact was immaterial for the reason that his son Ng Ming Yin was born in China. The relationship has always been conceded of Ng Fun to Ng Ming Yin to Ng Fook, grandfather, father and son. The fact that was not conceded by the Board of Special Inquiry was the citizenship. This case started out as a clean cut question of law, but when the law was decided in favor of the citizen applicant by the Board of Review, they turned around and rejected him on the ground of discrep-

ancies. The Board of Special Inquiry, of course, had before it the witnesses, and the advantage of the sworn testimony from the witness stand. In the opinion of the Board of Special Inquiry there never was a case before them where a clean cut question of law so clearly presented itself without the ordinary discrepancies. There is no question in the mind of anyone connected with the Board of Special Inquiry but that Ng Fook is the son of Ng Ming Yin and that his grandfather is Ng Fun, but the Board of Review grabbed at a straw to deny his birth right to the citizen applicant when it had decided the only question in the case in his favor. No one was more shocked at the decision than the Board of Special Inquiry. They had earnestly considered the question of law and believed they were right, but the shock came to them from the Board of Reviews hanging its decision upon discrepancies in spite of their finding, "The present testimony of the applicant and alleged father, while showing considerable agreement."

The argument in this case is based upon the fact that Ng Ming Yin was never a citizen of the United States, and that his admission as a citizen by the immigration authorities was and is contrary to law, and we have a Board of Special Inquiry writing a brief on the question which has been determined by

the appellate forum, the Board of Review, and insisting the Board of Review made a decision that was erroneous and contrary to law. The reason, of course, is that the Board of Special Inquiry do not feel justified in trying to reject the citizen applicant on any alleged discrepancies, because they know that he is the person that he represents himself to be, so to accomplish their end to reject the citizen they want the Board of Review overruled and their decision declared erroneous. Certainly, it is indeed a precedent to have the lower tribunal try to have the upper tribunal reversed.

The order of the court below should be reversed with directions that a writ issue.

The opening brief of appellant have taken up in detail the points raised by the Board of Review. This Court has recently decided the question here presented in an opinion by Judge Garrecht dated July 20th, 1936, entitled *Wong Gook Chinn, Appellant, vs. Marie A. Proctor, etc., Appellee,* No. 9098, and cited the following cases:

Go Lun vs. Nogle, etc., 22 F. (2d) 246, 247 (C. C. A. A. 9);

Ex Parte Jue You On, 16 F. (2d) 153, 154;
Gung You vs. Nagle, etc., 34 F. (2d) 848, 853 (C. C. A. 9);

Wong Hai Sing vs. Nagle, 47 F. (2d) 1021, 1022 (C. C. A. 9);

Louie Poy Hok vs. Nagle, etc., 48 F. (2d) 753, 755;

U. S. ex rel. Lee im Toy vs. Day, etc., 45 F. (2d) 206, 207;

Tillinghast, etc., vs. Wong Wing, 33 F. (2d) 290 (C. C. A. 1);

Fong Ton Jen, etc., vs. Tillinghast, 24 F. (2nd) 632, 636 (C. C. A.1)

and also the decision of Judge Wilbur in

Hon Chung vs. Nagle, etc., 41 F. (2d) 126, 129;

Ng Yuk Ming vs. Tillinghast, 28 F. (2d) 547 (C. C. A.1).

The Order of the Court below should be reversed, with directions that a writ issue.

Respectfully submitted,

EDWARD H. CHAVELLE,

Attorney for Appellant.

No. 8373

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 669.

THEODORE THOMPSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED that on July 2, 1931, a Complaint was duly filed herein, which is in the words and figures following, to-wit: [2]

COMPLAINT.

Plaintiff complains of the defendant and alleges:

I.

That at all the times herein mentioned the plaintiff was and still is a citizen of the United States and a resident of the State of Montana.

II.

That on or about the 18th day of September, 1917, the plaintiff enlisted in the armed forces of the United States; that he served the defendant in the United States Army from said date down to and including the 13th day of August, 1919, when he was discharged from said Army, and that during all of the said time he was employed in the

active service of the defendant during the war with Germany and its allies.

III.

That between said dates the plaintiff made application for insurance under the provision of Article Four of the War Risk Insurance Act of Congress and the rules and regulations of the War Risk Insurance Bureau established by said Act, in the sum of Ten Thousand Dollars ($10,000.00) and that thereafter there was duly issued to the plaintiff by said War Risk Insurance Bureau, a certificate of his compliance with the War Risk Insurance Act, so as to entitle him, and his beneficiaries, to the benefits of said Act, and the other Acts of Congress relating thereto, and the rules and regulations promulgated by the War Risk Insurance Bureau, the [3] Veterans' Bureau, and the Directors thereof, and that during the term of his service with the said War Department, in said Army as aforementioned, there was deducted from his pay for said services by the United States government, through its proper officers, the monthly insurance premiums provided for by said Act and the rules and regulations promulgated by the War Risk Insurance Bureau, the Veterans' Bureau, and the Directors thereof.

IV.

That during the period of his service in said war with Germany and its allies as above mentioned

and while said insurance was in full force and effect the plaintiff contracted certain diseases and disabilities and suffered certain injuries, which said diseases, injuries and disabilities have continuously, since the date of his discharge from the defendant's army, rendered and still do render the plaintiff wholly unable to follow any substantially gainful occupation, and such diseases and disabilities and injuries are of such a nature and founded upon such conditions that it is reasonable to suppose and believe that it will continue throughout the life time of the plaintiff to so render the plaintiff unable to follow any substantially gainful occupation, and that the plaintiff has been ever since his discharge from the defendant's army and still is totally and permanently disabled by reason of and as a direct and proximate result of such diseases, injuries and disabilities received and contracted while his War Risk Insurance was in full force and effect.

V.

That the plaintiff in writing on Dec. 18, 1919 made application to the United States Government, through the Veterans Bureau, and the Director thereof, and the Bureau of War Risk Insurance, and the Director thereof, for the payment of said insurance, and for [4] the monthly payment due under the provisions of said War Risk Insurance Act, for total permanent disability, and that the said Veterans Bureau, and the said Bureau of War Risk Insurance, and the Directors thereof,

have refused to pay the plaintiff the amount provided for by the War Risk Insurance Act, and have disputed the claim of the plaintiff to the benefits of said War Risk Certificate, issued under the Act, and by written letter dated January 15, 1920 refused to grant him said benefits and have disagreed with him concerning his rights to the insurance benefits of said Act.

VI.

That under the provisions of the War Risk Insurance Act and the other acts of Congress relating thereto the plaintiff is entitled to the payment of FIFTY-SEVEN AND 50/100ths DOLLARS ($57.50) for each and every month transpiring from and after the date of his discharge from the defendant's army and all such monthly installments accruing since the date of his discharge are now due and owing from the defendant to the plaintiff.

VII.

Plaintiff has employed the services of Molumby, Busha & Greenan, Lawyers, duly licensed to practice their profession in the state of Montana to prosecute this action to a conclusion, and that under the provisions of the War Risk Insurance Act the court as a part of this judgment or decree may allow as a reasonable attorneys' fee the sum of ten per cent (10%) of the amount recovered under the contract of insurance and to be paid by the bureau out of the payment to be made under the judgment and in accordance with the law at a rate not to exceed one-tenth (1/10) of each of such

payments until paid and that ten per cent (10%) is a reasonable attorneys' fee in the premises. [5]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of FIFTY-SEVEN AND 50/100ths ($57.50) DOLLARS per month for each and every month elapsing from and after the 13th day of August, 1919 until the date of judgment herein.

2. That the Court as a part of its judgment or decree direct that ten per cent (10%) of the amount recovered under the contract of insurance and to be paid by the bureau out of the payments to be made under the judgment and in accordance with the law and at a rate note to exceed one-tenth (1/10) of each of such payments be paid to the attorneys for the plaintiff as a reasonable attorneys' fee.

3. For such other and further relief as to the court may seem just.

MOLUMBY, BUSHA & GREENAN,
Attorneys for Plaintiff. [6]

State of Montana
County of Cascade—ss:

LOY J. MOLUMBY, being first duly sworn upon oath deposes and says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true to the best of his knowledge, information and belief; that the reason this verification is made by the affiant is that the plaintiff does not now reside

within the County of Cascade wherein this affiant resides and makes this verification.

LOY J. MOLUMBY.

Subscribed and sworn to before me this 1st day of July, 1931.

[Seal] P. G. GREENAN,
Notary Public for the state of Montana,
Residing at Great Falls, Montana.

My commission expires June 14, 1933.

[Endorsed]: Filed July 2, 1931. [7]

Thereafter, on April 18, 1932, Answer was duly filed herein, which is in the words and figures following, to-wit: [8]

[Title of Court and Cause.]

ANSWER

COMES NOW the Defendant and for answer to the complaint of the plaintiff herein, admits, denies and alleges:

I.

Alleges that it has no information sufficient to form a belief as to the allegations of Paragraph I of the complaint herein and therefore denies the same.

II.

Admits the allegations of Paragraph II of the complaint herein except the allegation that the plaintiff enlisted on September 18, 1917, and in this connection alleges the fact to be that the plaintiff enlisted on September 19, 1917.

III.

Admits that plaintiff on February 1, 1918 made application for insurance in the amount of Ten Thousand Dollars ($10,000.00) under the provisions of Article IV of the War Risk Insurance Act, and admits that during the term of his service there was deducted from his pay for said service the monthly premiums provided for by said Act, and denies each and every other allegation contained in Paragraph III of the complaint herein. In this connection the defendant alleges that plaintiff failed to pay the premium due on said Ten Thousand Dollars ($10,000.00) insurance on the 1st day of September, 1919, and that by reason thereof the said insurance [9] lapsed and was cancelled on October 1, 1919.

IV.

Denies each and every allegation, matter and thing contained in Paragraph IV of the complaint herein.

V.

Admits that the plaintiff made application to the United States Government for the payment of said insurance in a demand dated June 22, 1931, and denies each and every other allegation contained in Paragraph V of the complaint herein, and in this connection alleges that the Director of the Veterans' Bureau and the Administrator of Veterans' Affairs has not denied said claim as set forth in the complaint of the plaintiff herein and that no one acting in the name of the Director of the Veterans' Bureau or Administrator of Veterans' Affairs has rendered a denial of the claim herein sued upon, and further alleges that no disagreement as required by Section

445, Title 38 of the U. S. Code exists as to the claim herein sued upon.

VI.

Denies each and every allegation, matter and thing contained in Paragraph VI of the complaint herein.

VII.

Alleges that it has no information sufficient to form a belief as to the services of the attorneys as alleged in Paragraph VII of the complaint herein and therefore denies the same.

Except as herein specifically admitted, qualified, or denied, denies generally and specifically each and every and all the allegations of the said complaint.

Further answering and as an affirmative partial defense herein, the defendant alleges:

I.

That during the month of July, 1921, upon application of [10] the plaintiff, the defendant reinstated one-half of the plaintiff's original Ten Thousand Dollars ($10,000.00) War Risk Term Insurance and converted the same to a United States Government Life Insurance Policy in the amount of Five Thousand Dollars ($5,000.00); that the premiums on said converted insurance in the amount of Five Thousand Dollars ($5,000.00) were paid to include the month of August, 1931, and that the plaintiff now has the said policy of converted insurance in his possession and control.

II.

That the plaintiff must surrender and waive all rights under said policy of converted insurance in

the amount of Five Thousand Dollars ($5,000.00) and cannot recover on said term insurance unless and until he surrenders said policy of converted insurance to the defendant in accordance with the provisions of Section 518 of Title 38 of the U. S. Code.

For a Second Affirmative Defense alleges:

That the action is barred by the provisions of Section 445 of Title 38, U. S. C., the same not having been brought within six (6) years after the right accrued for which the claim is made.

WHEREFORE, the defendant, having fully answered the complaint herein, prays:

I.

That the case be dismissed on its merits and that the defendant have its costs.

II.

That if the plaintiff be found entitled to recover on the contract herein sued upon, to wit: that founded upon the application of the plaintiff dated February 1, 1918, he be required to surrender to the defendant for cancellation the said policy of converted insurance in the amount of Five Thousand Dollars ($5,000.00) which he now holds.

WELLINGTON D. RANKIN
United States District Attorney,
for the District of Montana.
By D. L. EGNEW
Assistant United States
Attorney
D. D. EVANS
(Attorneys for the defendant) [11]

State of Montana,
County of Lewis and Clark—ss.

D. L. Egnew, being first duly sworn, deposes and says that he is the Assistant United States Attorney in and for the District of Montana and one of the attorneys for the defendant named in the foregoing answer, and as such is acquainted with the facts in the case; that he has read the answer and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

D. L. EGNEW
Assistant United States Attorney

Subscribed and sworn to before me this 15th day of April, 1932, at Helena, Montana.

[Seal] MARJORIE McLEOD
Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires March 31st, 1934.

[Endorsed]: Filed April 18, 1932. [12]

Thereafter, on June 23, 1936, the cause came on for trial, and was tried on June 23, 24, and 25, 1936, the

MINUTE ENTRIES OF THE RECORD OF TRIAL

on said dates being as follows, to wit: [13]

No. 669, Theodore Thompson vs. United States

This cause came on regularly for trial this day, Messrs. Molumby, Busha & Greenan appearing for

plaintiff, and Mr. R. Lewis Brown and Mr. Francis J. McGan appearing for the United States.

Thereupon the following named persons were duly impanelled, accepted and sworn as a jury to try the cause, viz:

R. M. Emmons, Arthur Hamilton, E. G. Timm, Clyde O. Palmer, Ben B. Hagerman, C. B. Isler, Hal M. Panton, Andrew Olson, James Noyes, C. E. Richardson, Stewart North and S. C. Hannon.

Thereupon Theodore Thompson, Dr. Richards, and Dr. Allard were sworn and examined as witnesses for plaintiff, and plaintiff's exhibits 16, 11 and 12, and defendant's exhibits 7, 8, 5, 10, 17, 18, 9, 1 and 19 were offered and admitted in evidence, in the order named, whereupon further trial of cause was continued until 10:00 A. M. tomorrow.

It was agreed by the parties and ordered by the court that plaintiff's Exhibit No. 16, (his Honorable Discharge from the army), may be later withdrawn and copy substituted.

Entered in open Court June 23, 1936. Billings, Montana.

C. R. GARLOW,
Clerk. [14]

No. 669, Theodore Thompson vs. United States.

Counsel for respective parties, with the jury, present as before and trial of cause resumed. Thereupon Theodore Thompson was recalled as a witness for plaintiff and defendant's exhibit No. 20 was

offered and admitted in evidence. Thereupon Carl Bue, O. P. Terland, O. A. Nepstad, Leo Overfelt, Adolph Myrstol, James R. Davis, R. H. Cartwright and Dr. D. Claiborn were sworn and examined as witnesses for the plaintiff, whereupon plaintiff rested.

Thereupon defendant moved the court for a directed verdict, for lack of proof, which motion was by the court denied and exception of defendant taken and noted.

Thereupon F. J. McGan, and M. E. Hawkins were sworn and examined as witnesses for defendant, Theodore Thompson and Dr. Claiborn were recalled as witnesses for defendant, and a certain affidavit of mailing, filed herein on July 30, 1931, was offered by defendant and admitted in evidence, whereupon defendant rested. Thereupon Dr. D. Claiborn and Theodore Thompson were recalled in rebuttal, whereupon plaintiff rested and the evidence closed.

Thereupon defendant renewed its motion for a directed verdict, for lack of proof, and on the further ground that this action is barred by the provisions of Section 445, Title 38, U. S. C., which motion was by the court denied and the exception of defendant duly taken and noted.

And thereupon, after the arguments of counsel and the instructions of the court, the jury retired to consider of its verdict, the defendant's exception to the refusal of the court to give a certain instruction offered, being duly taken and noted.

The Marshal was ordered by the court to furnish meals and lodging to the jurors and bailiffs.

Thereafter, at 6 P. M., the jury was instructed by the court to seal its verdict, if agreed upon, and return the same into court at 10 A. M. tomorrow.

Entered in open court June 24, 1936, at Billings, Montana.

C. R. GARLOW,
Clerk. [15]

No. 669, Theodore Thompson vs. United States.

Counsel for respective parties present as before.

Thereupon the jury returned into court with its verdict, which was duly received by the court, read and filed, and by the jury acknowledged to be its true verdict, as follows, to wit:

[Title of Court and Cause.]

"We, the jury in the above entitled cause, find for the plaintiff and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 13th day of August, 1919. James Noyes, Foreman."

Thereupon judgment was ordered entered accordingly.

Thereupon, on motion of F. J. McGan, counsel for defendant, and by agreement of counsel for the plaintiff, court ordered that defendant be and is granted ninety days in addition to the time allowed by rule in which to prepare, serve and lodge herein its proposed bill of exceptions and that the term be

and hereby is extended until said Bill of Exceptions shall be finally settled.

Entered in open court June 25, 1936, at Billings, Montana.

C. R. GARLOW,
Clerk. [16]

Thereafter, on June 25, 1936, the Verdict of the Jury was duly filed herein which is in the words and figures following, to wit: [17]

[Title of Court and Cause.]

VERDICT.

WE, THE JURY, in the above entitled cause, find for the plaintiff, and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 13th day of August, 1919.

JAMES NOYES,
Foreman.

[Endorsed]: Filed June 25, 1936. [18]

Thereafter, on July 18, 1936, Judgment was duly filed and entered herein in the words and figures following, to wit: [19]

In the District Court of the United States in and for the District of Montana, Billings Division.

No. 669.

THEODORE THOMPSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

This cause came on regularly to be tried on the 23rd day of June, 1936, Molumby, Busha & Greenan, appearing as counsel for the plaintiff, and R. Lewis Brown, Assistant United States Attorney for the District of Montana, and Francis J. McGan, Attorney, Department of Justice, appearing as counsel for the defendant. A Jury of twelve persons were regularly empaneled and sworn to try said cause; witnesses on the part of the plaintiff and the defendant were sworn and examined; after hearing the evidence, arguments of counsel and the instructions of the Court, the jury retired to consider of their verdict, and returned into Court their verdict in words and figures as follows:

"We, the Jury, in the above entitled cause, find for the plaintiff and against the defendant.

and assess his damages in the amount of installments of War Risk Insurance accruing from and after the 13th day of August, 1919.

James Noyes, Foreman."

and the court being advised in the premises, it hereby specifically finds that the plaintiff has employed Molumby, Busha & Greenan, duly licensed and practicing attorneys, licensed to practice their profession before this Court, the Courts of the State of Montana, and before the United States Supreme Court, to prosecute this action, and finds as a reasonable attorney fee ten per cent (10%) of the amount recovered under the contract of insurance to be paid [20] by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law, at a rate not to exceed one-tenth of each of such payments until paid.

WHEREFORE, by virtue of the law, and by reason of the premises, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff do have and recover of and from the defendant, the United States of America, Fifty-seven and 50/100 Dollars ($57.50) for each and every month elapsing from and after the 13th day of August, 1919, and on or prior to which date the Jury found the plaintiff to be permanently and totally disabled, and up to and including the date hereof, and for the further sum of Fifty-seven and 50/100 Dollars ($57.50) per month from and after

the date hereof, so long as the plaintiff shall remain permanently and totally disabled, and the Court as a part of its judgment determines and allows, as a reasonable attorney fee for the attorneys for the plaintiff, ten per cent (10%) of the amount recovered under the contract of insurance and to be paid by the United States Veterans' Bureau out of the payments to be made under the judgment and in accordance with law at a rate not to exceed one-tenth of each of such payments until paid.

Dated: July 18th, 1936.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed July 18th, 1936. [21]

Thereafter, on September 25, 1936, Bill of Exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit: [22]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED That the above entitled cause came on regularly for trial on the 23rd day of June, 1936, being one of the days of the....., term of said Court, before Honorable Charles N. Pray, a Judge of the said Court, and a jury duly empaneled. Messrs. Molumby, Busha & Greenan,

appeared as counsel for the plaintiff; and R. Lewis Brown, Esq., Assistant United States Attorney for Montana, and Francis J. McGan, Attorney for the Department of Justice, appeared as counsel for the Government. And upon the issues joined, the following proceedings were had:

THEODORE THOMPSON,

The plaintiff, being called as a witness in his own behalf, and being duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

I am Theodore Thompson, the plaintiff in this case. I live down near Reed Point, Montana. I have lived down in that country ever since 1912. That is when I came over from the old country. I was born in Norway and was 19 years old when I came to this country. I came here in 1912. [26] After I came out to this country around Reed Point I was working mostly around stock. I worked some on some of the sheep ranches down in there. Prior to coming to this country I had a seventh-grade schooling. I had that schooling in Norway. When I came to this country I could not talk English. What English I learned I acquired by contact with American people. I have not gone to school in this country for any length of time. At the time I went into the army I could not talk

(Testimony of Theodore Thompson.)

English as well as I can now. I was not at that time able to read and write English. Since that time I have not acquired some knowledge so that I am able to read the English language myself, except the common words. Some of the high words I can't read or understand at all. The only way I can write in English is my own name. I can not write the words out if I take considerable time and learn how to spell the words. I would not be able to carry on any correspondence in the English language.

I went into the United States Army during the World War. At the time I went in I was working at Reed Point for O. A. Nepstad and Carl Bue. At that time I was tending camp in the mountains. At that time I was getting a salary of about $80.00 a month. I worked for those two men practically all of the time since I came to the country. During the time that I was working for them I did other work than tending camp. I worked on ranch for them, in the haying and I worked for them in the threshing and I also herded sheep. I worked steadily for them all the time, and did all the work commonly done upon a sheep ranch. [27]

I served in Company D, 347th Machine Gun Battalion, 91st Division, in the Army. After I enlisted I first went to Camp Lewis, Washington. While at Camp Lewis I got hurt in the right knee, at a time when we were out on a night maneuver and it was dark and raining and as we were marching through the woods I fell into a hole of some

(Testimony of Theodore Thompson.)

kind. As near as I could describe it, it was a rotten stump that had rotted out, and I twisted my knee. I fell on my body, and the weight of my body jerked it back; and now when I walk it kind of hurts me and jerks back. After I stepped in this hole, it affected me for some time thereafter. I was limping and it was hurting me quite a bit. I was laid off duty, just in the barracks, you know. I told the Captain about it, and he said "You just better stay around the barracks a few days and maybe it will get better." After that it improved to a certain considerable extent. At that time I had my left leg, and I throwed my weight on my left leg and I could kind of protect my right leg. That right leg has bothered me continuously from that time on. It affects me when I am walking. If I don't watch how I fix my foot or place my foot, it kind of hurts and grinds back in my knee. To overcome that situation, I kind of take hold of it and kind of hold it in place, like. That happens when I am walking around and I step sideways or something, and then there is just a kind of catch in there. That has been true ever since I was hurt out there at Camp Lewis. It is getting worse as time goes on. The cause of that is that I have got to put all my weight on my right leg. I am a one-legged man now, and have been since [28] I was in the army.

While I was at Camp Lewis I contracted measles. I could not recall really when that was, but it was either in February or March, 1918. I was hospital-

(Testimony of Theodore Thompson.)

ized for the measles, and while hospitalized I got the mumps. I remained there and was treated both for the measles and mumps at the hospital. I was a month or six weeks at the hospital. When I got out of the hospital I was weak and nervous and had lost weight and was not able to go back to duty as soon as I got out of the hospital. I had orders from the hospital to report back to the barracks and then I was put in quarters in the barracks, ordered to stay in the barracks without hard duty. I was marked quarters. By "marked quarters" they meant when a man went back to his barracks to his company he had orders from the doctor to the Captain to keep that man off of hard duty. I had no duties at all to perform when I was in quarters. I was compelled to stay in the barracks all the time. I was marked quarters for a period of about two weeks. Thereafter, I went back to duty as a soldier. About three months, I should judge, after I went back to duty as a soldier I went back east to go over seas. I embarked in June from New York to go over seas, and went over with the 91st Division. I arrived in Europe at London, and after debarking in London remained in England, as near as I can recollect, about a month. We were not training in England at all. I arrived in France at Brest. After arriving in France we then went into training up in the country some place. I have forgotten the name of the [29] town. I was in training two or three months before being shipped up to the front. We were first shipped to the St. Mihiel section of the

(Testimony of Theodore Thompson.)

front. I was in the St. Mihiel front about six or seven days, and was engaged in actual battle at St. Mihiel during those six or seven days. After I was at the St. Mihiel front, I was sent to the Argonne. Prior to going up to the Argonne we did not go back in a rest camp. Between the time we came out of St. Mihiel and went up to the Argonne we kept hiking and on the train, and were moved from one front to another. We marched for a couple of days, I guess, and then we entrained and went right up to the Meuse-Argonne. When we got up to the Meuse-Argonne we did not engage in battle right away. We were back of the line there in the woods, laying under cover for three or four days until we got prepared to make a drive. We were under fire during that time and were in an area where there was shelter. From those woods we were sent into the front line trenches. I remained up there in the Meuse-Argonne front line the first time sixteen days, and came out at the end of those sixteen days. At that time we were heading for a rest camp and something happened up in the front and we did not get back to the rest camp. I do not know what happened up at the front, but we were ordered right back again and I went back and was up there at this time about ten days. I was in actual battle all of that time, after I had been previously sixteen days under shell fire up there all that time. At the end of the ten days in the Meuse-Argonne we went back to the rest camp. I could not [30] possibly say how far back that was, but we went

(Testimony of Theodore Thompson.)

back quite a ways and camped and laid around in the brush. I was in the rest camp about two weeks. From there I was sent to Flanders Field, Belgium. We got there by hiking part of the way and a part of the way we went on the train. When I arrived in Belgium I went up to the Flanders front. I was up there about three days. At the end of the three days is when I was wounded.

Going back to the time that I went up to the St. Mihiel front, I had experiences which affected my health, and also in the Meuse-Argonne. I got an awful stomach trouble, and cramps in my stomach, from the food I was getting and also from the water I was drinking. Up there at the front I had canned meat, in cans, commonly called corn willie. That was the only food that I had. Our food kitchens were not able to get up to the front while we were up there. The water I had to drink was out of the shell holes. That was the only water that I had to drink there. That area in the Meuse-Argonne was under gas at that time. The gas that was sent over by the Germans there was sent over by shells, and the shells struck the ground and they bursted and the gas was laying like a cloud under the ground. Gas always sinks down in the ground, the lowest places it can sink, and of course it got into the water. It was cloud gas and mustard gas. After the shell explodes, this gas sinks. I do not know if I could taste it in the water, but the water had an awful bad taste. This water that came from the shell holes came from rain.

(Testimony of Theodore Thompson.)

When a battle was on, it rained every day. [31] It was all over the ground and it ran around over the dead men and dead horses and down in the shell holes. This water and eating that corned willie gave me cramps all over my stomach and diarrhea and passing blood. This diarrhea was very severe. I could not take care of myself. It has lasted ever since. It affected me with nausea and I had vomiting spells.

During that time and in that area that was being gassed, I encountered gas myself, and got gassed. It happened the second time in the Argonne, the last ten days we were in there. When we first went in, we got a bunch of new men that just came over from the States, and they went in with us to the line. And the first night, I believe it was, I was put on as a detail to take 19 of those men up to the front and move some ammunition from one dugout over a hill and into another dugout, and during that time the enemy commenced throwing gas shells at us and several of the boys were not used to gas masks and they got excited, and two of them couldn't get their masks one, and I ran up and tried to help them get their masks on; but before I could get my mask on I got some gas, and that is how I got gassed. The effect of the gas on me was that it choked me. It was either mustard gas or this cloud gas. The inhaling of this gas affected me by choking my throat and I could not get my breath. And it affected my stomach. I was

(Testimony of Theodore Thompson.)

vomiting. For about a day or two I was vomiting every once in a while. After I inhaled this gas, after those two or three days were over, it affected my ability to breathe. I am being short-winded [32] ever since. This stomach trouble that I mentioned, coming from the poisoned water and food, has remained with me. I still have that stomach trouble yet. Since I got out of the army I get spells so I can't hardly eat anything, just vomiting. Just drinking common water, that even won't stay down in my stomach. I just vomit it up again. Those spells will go for one month or two or three months, and all at once it will come on me and stay for a month or so. The last spell of that kind I had was in April of this year. At that time I was called to Helena, at the Veterans Bureau at Fort Harrison.

Going back to the time I was up in Flanders Field there, I stated I was there three days. I remember the day I went into the front lines in Flanders Field. It was October 30th. I came out October 31. The morning of the 31st of October we were advancing across a railroad track and at about noon we were halted. We had orders to halt and we laid around there under cover for a while. I couldn't say just the length of time, but the first thing we knew we were ordered back over this railroad track again; and as we came back over there was an old house and kind of barn like, and we were laying around there under cover. And as I was sitting there on two ammunition machine

(Testimony of Theodore Thompson.)
gun boxes, which I was carrying, I could hear an airplane, and I kind of looked up under my helmet and I could see that airplane make a loop, which they used for a signal, you see, to the artillery to throw the shells over, and I told the men that I was in charge of we had better move a little. But before [33] we could do that the shell came over and bursted and struck me in my left knee, and I fell on my back. And as I kind of came to again and looked around, one of the boys was dead and another one lost his right arm and it was kind of throwed over his left shoulder. I looked down on myself, and I could see the bone sticking out of my left knee, and the blood was just all pouring out of it, and then I passed out. I don't know what took place. When I came to, I was inside of this barn. At the time I was hit, and before I was hit, there was nothing in the barn, as I remember. When I came to they were using the barn for a dressing station for the wounded. The Medical Corps was up there using that when I came to. There were other wounded men laying around the barn, being taken care of. At the time I was hit, I could not say if there were any of the Medical Corps up there at all. I did not see any at the present time. I judge I was hit about two o'clock in the afternoon, and it was about eight or nine o'clock at night when they moved me out of that first aid dressing station. They moved me by ambulance. I remember the trip by ambulance from there. They

(Testimony of Theodore Thompson.)

took me to a field hospital. That was not an American field hospital. It was an English field hospital. I have no idea how far back of the lines it was; I could not say. I could not say how long I rode in the ambulance getting back there. I was both conscious and unconscious during the trip. I was conscious part of the time, and unconscious part of the time. When I got back to the field hospital, the first thing they did when I arrived there was to give me a shot in the arm, and [34] then they took me into an operation room and cut my leg off. At that time they cut my leg off just above the knee. It was the left leg. I remained in that field hospital five or six days. Then they loaded me on a hospital train and took me down to France.

During the time I was in the field hospital and the first aid dressing station, my stomach was in bad condition. I was vomiting and had cramps in my stomach. They gave me no treatment that I know of for that. I could not say what percentage of the time that I was in the field hospital and dressing station I was unconscious. I would come to myself and then pass out again, and come to myself and pass out again; I could not say. My recollection of the things that transpired there, now as I look back on it, is just like a dream.

When I left the field hospital, I was taken to a base hospital at Boulogne, France. I was in the base hospital for quite a while, two or three months. While I was in the base hospital they were treat-

(Testimony of Theodore Thompson.)
ing my leg wound and dressing it. At that time I got gangrene in my leg. They treated this gangrene. They put me under ether, or gas, whatever it was, and operated some more on it. I do not what they did when they operated. I could not say what they did, but I know they operated on me. They did that more than once while I was in the base hospital; they operated more than once, but I could not say how many times.

After I left the base hospital, I was sent to England, to a point outside of London. I was at the hospital [35] there. That was a kind of rest hospital; what they call a convalescent hospital. While I was there I received treatment. There was pus or something formed in my leg around the bone on the flesh. I don't know what treatment they gave me for that. They just put me under ether and the doctors took care of it. Whatever they did, I don't know. They put drains in the stump. The drains were there after the operation. It seemed to me that I remained at this convalescent hospital near London around three weeks. From there I was shipped back to this country. I came back to this country on a hospital boat. While on the hospital boat I did not receive any treatment. I was not able to walk at that time. I was still a bed patient when I was on the hospital boat. I arrived at New York City when I came to this country.

During this period, when I was at the convalescent hospital and on the hospital boat, my stomach

(Testimony of Theodore Thompson.)

was cramping and I was vomiting. The doctors did not give me any treatment for that that I know of. I was not taking any medicine all during this time. During this period of hospitalization I was still bothered with the dysentery, and that was true all the time when I got back to this country. I arrived in this country at New York and was taken to the Green Hut Hospital, which is right near New York. I remained in the Green Hut Hospital about a week's time and from there went to Fort Des Moines, Iowa. I was at Fort Des Moines, Iowa, until I was discharged, a period of about five or six months. I was in the hospital during all of that time. [36]

I think the first time I got out of bed was in New York City, at the Green Hut. I was not able to get around then. When I got up out of bed they gave me a pair of crutches. The doctor came in there one morning and asked me if I believed I could get out of bed. "I will try it," I said. He said, "I will give you some crutches," so he brought the orderly in with some crutches. And so I got up and tried to get out of bed, but I had been in bed so long I was dizzy and couldn't stand it, and I just fell back into bed again. After that, while I was in the Green Hut, I got up and used crutches. While I was there the orderlies helped me a few times to get up and back on the floor until I got kind of used to it.

(Testimony of Theodore Thompson.)

When I came to Fort Des Moines I was not put in bed. I was able to be moving around. From then on, until the time I was discharged, I was around on crutches most of the time. During the time I was at Fort Des Moines I was operated on again. A piece of bone which the doctors called a spur had grown out from the bone. They gave me ether and put me under the operation and cut it off, I guess.

After my leg was amputated the first time, it was later cut off and made shorter. That was over in France, when I was at the base hospital. My leg was first cut off two inches above the knee in the field hospital in France. Then later, when I was at the base hospital in France, they cut it off higher up. And then, while I was in the hospital at Fort Des Moines they cut this spur off. I am pointing out to the jury the place where my leg is cut off, here. [37]

While I was at Fort Des Moines the condition of my stomach was such that I was having cramp spells, off and on, and vomiting. My good knee at that time was hurting. At that time, when I first attempted to walk, when I was learning to walk after I had crutches, I couldn't stand. I could not put my weight on my right knee. It wouldn't hold my weight on it. I was just like something was catching it in the joint.

I was discharged at Fort Des Moines on the 13th of August, 1919. At that time I was not still on

(Testimony of Theodore Thompson.)

crutches. At that time they had fitted me out with an artificial leg. At that time I was not able to walk without the aid of two canes or a crutch. At the time of my discharge the condition of my other knee was the same as it always was; just the same as I have heretofore described. The condition of my stomach was the same.

After I was discharged, I went back home to Reed Point, Montana. When I came out here to Reed Point and when I went into the army I was not married. I had a relative living here at that time. That relative was Mr. Carl Bue, a cousin. When I came back to Reed Point I first went to the ranch of a fellow who lived there by the name of John Barstad. He was a neighbor of mine prior to the time I went into the army. I do not remember now how long I remained with Mr. Barstad. It was just a few days. He lived about fifteen miles from the town of Big Timber, and I should judge about fourteen miles from the town of Reed Point. He lived about five or six miles from Carl Bue's place. [38] After leaving the Barstad place I went to Carl Bue's place. He is the cousin whom I mentioned. I then lived there with Carl for about three or four months. I was not remaining their steadily during that time. I was staying around among the neighbors, O. P. Terland, John Crone and Adolph Myrstol, who were all acquaintances of mine. I stayed a few days at those different places, and then would go back over to Carl Bue's place.

(Testimony of Theodore Thompson.)

I did not attempt to do any work while I was there at Carl's place or at any of those other places. While I was at Carl Bue's place the Government did not get in touch with me at all. They did write me and took up the matter of vocational training with me while I was there. I then went for examination to several different places. I was sent to Billings and I was also sent, I believe, to Livingston once. The Government then put me in vocational training at Bozeman. The type of training that they gave me was agriculture. The nature of the work that I had to do there while I was in training was lecture work and machinery work and farming. I had to judge stock while I was in training. With reference to machinery, we had to take it apart and put it together, and they gave me lectures, on how the machinery worked, and all about it. As a student, as far as farm work was concerned, I had to write down different names and different stuff. I was not able to do that. I could not write down the notes. I wrote down the notes, but I couldn't spell them right.

Q. Could you read them after you wrote them down? [39]

Mr. BROWN: Object to that as a conclusion, if the Court please.

The COURT: Yes; he can aswer if he could read or write.

(Exception noted)

(Testimony of Theodore Thompson.)

Q. You may answer.

A. No, sir.

I had difficulty in understanding what the professors were saying in their lectures. At that time I was not able to understand English as well as I do now. I cannot recall now what all the other duties were that I had there in training, but it was several different things in the same line of duty. I was there in Bozeman all together about three months.

My physical condition while I was there in training was the loss of my left leg, and I was vomiting, my stomach trouble, and also my nervousness. At that time my nervous condition was jumpy and excitable. It was pretty hard for me to apply myself while I was there to study. I couldn't keep up in the class. Of course, I couldn't read and write the American language; I didn't have that experience. I was never schooled in this country. I had no schooling in this country at all after I came here. When I was up there at Carl Bue's place and Nepstad's place before the war, the workmen that were there were people from the old country, all of them. We talked Norwegian. I did not talk English when I went into the army to any extent. While I was in the army I picked up [40] considerable English.

Back before I was discharged from the army, I noticed this nervous condition that I mentioned as being present while I was in training. I first noticed that over in the Meuse-Argonne, after I came out.

(Testimony of Theodore Thompson.)
In that respect I was jumpy, and anything that was noisy or anything that was moving around, I was jumpy and nervous and shaky. That condition has remained with me since then and affects me now. On occasions when there is any excitement or anything like that I just get so nervous I can't hardly take care of myself. That was true also before I got out of the army.

After my training of three months I went back down home to Mr. Bue's place. I went back down there on the train. I left training because I couldn't keep up with the class, and my nervous condition, and I just got disgusted. I just can't remember now whether I informed the men in charge of my training that I was not able to get by or talked it over with them at all. We had a talk there, but I just can't quite remember what it was. I do not remember who it was that I talked to about it. I can't recall his name. I talked to the professors who were giving me instruction. It was a professor that was giving me the instruction that I talked to. I myself made up my mind that I was unable to take that type of instruction. I tried to inform them of that fact, too. At that time I made out a certain paper that they asked me to make out or signed some papers, but what it was in it, I don't know. I never afterwards took any training of any kind. [41]

This training was all at Bozeman. After leaving Bozeman, I came back to Carl Bue's place and remained there about a month. From there I went

(Testimony of Theodore Thompson.)

to Mr. Myrstol's. I lived at Myrstols' about a year and better. I was living there with him on his place. I was living in his house. I did not pay him anything for living there. I lived there over a year. His place was west of Reed Point, Montana, six miles. I obtained consent to live there. During that time I was baching all of that time. During that time I had assistance in getting wood. I didn't get the wood at all, but he had a lot of wood split there and he just told me if I could manage to get it in, to use it for cooking; or things like that, that I could just help myself to it. During that year and a half that I was on his place, other neighbors were coming over and helping me. I did not split wood during that time. Mr. Myrstol split it and some of the neighbors came over and they split an armful or two.

At the end of that period, I went on the homestead. From the time I was discharged, up until the time I went on my homestead, I did not attempt to do any work of any kind. I could not. I took up the homestead that I mentioned before I went to the war. There were improvements on the homestead when I went to the war. I had a house on it. After I came back, I did not place any further improvements on it. I had someone put some on it. I had Mr. Bue to fence the homestead. Mr. Bue was using the place while I was in the army. He was using it for pasture. After I moved up there, I then proved up the place. [42] At the time

(Testimony of Theodore Thompson.)
that I proved up, the proof that I offered showed certain improvements. All those improvements that were shown in my proof were on the homstead prior to the time I went into the army, outside of the fence. I just had a house and barn on the homestead. I had a team of horses. I stayed on the homestead for about six months, I would judge. I had this team of horses that I mentioned before the war. While I was in the army they were at Mr. Barstad's place. I was upon the homestead from four to six months, and then I went over to Terland's place. That is not a place that I owned. There was a farmer by the name of Hans Omdal with me, and he moved me over to that place. I asked Mr. Terland if I could live in his house, and he said "Yes." This was a vacant house that was on Terland's place. While I was up to the homestead a fellow by the name of Hans Omdal was up there with me during that time, and when I moved up to the Terland place, Hans moved with me. I had no work to do up there. I was at the Terland place about a year and a half or two years, and then I went to reside on the place where I am now living. During this year and a half or two years that I was there on Terland's place, there was somebody there with me. There was one person with me the biggest part of the time. That was a fellow by the name of Hans Omdal, the same fellow that was up to the homestead with me. I had no work to do at all there at Terland's place. I had

(Testimony of Theodore Thompson.)
two head of horses, but no other stock at all; and I had no crop of any kind.

I bought the place that I am living on now. [43] I paid $2500.00 for it. I borrowed the money to buy it from Mr. Bue. He is the Mr. Bue I mentioned before as being my cousin. I gave him a mortgage as security for the loan on the place I bought and also on my homestead. Subsequently I paid back the twenty-five hundred dollars. I paid him back with my homestead, by selling the homestead to him. He did not call the indebtedness of twenty-five hundred square for the homstead. He credited me with twenty-four hundred dollars for the transfer of the homestead, and I still owed him a hundred dollars. There were 520 acres in this homestead. There were 320 acres in the place that I bought for the twenty-five hundred that he loaned me. Subsequently I bought some more land, in 1930 or 1931. I paid $900.00 for that. I got that money by borrowing $1800.00 from Carl Bue. I gave him security for that $1800.00. I gave him a mortgage on the land. I have not paid him back that $1800.00, nor any part of it.

Since I went up on this place that I am now living on, I have acquired stock, horses and things of that kind. I bought them with money from my compensation from the Government. The Government is paying me compensation because of my disability, and I was able to save enough out of the compensation to make the purchase of this stock.

(Testimony of Theodore Thompson.)

Since I have had the care of that stock up there, I have not been alone in the care of that stock. I have had to hire a man to take care of them. I got the money to pay the man from my compensation. I have not acquired enough income from the ranch to keep the ranch self-supporting. [44]

I have somewhere around forty head of cattle. That is as much stock as I have had at any time. I have not had that much all of the time. I started off with two head and later bought some others. The type of those cattle is range cattle. I have two milk cows. I do not do the milking myself. Off and on, if a hired man is not there, I can milk a cow, if she is gentle. I have attempted to milk a cow and I got hurt from it. As a general rule the hired man does the milking.

I have not attempted to put up hay myself. I have had to hire it done. There is a difference in the amounts of hay which I cut up there per year. As to what is the average yield there, over a period of years; I never did have the hay measured at any time, and I could not say just how much hay there is, but I would judge about thirty tons on an average. I do not know what is the highest yield I ever got off of it, but between fifty and seventy-five tons.

I am not able to get out in the field and drive a team. I have not done that at all since I got out of the army. I have not tried to harness a team since I got out of the army. I have tried to drive a team since I got out of the army. I have driven

(Testimony of Theodore Thompson.)

a derrick team since I got out of the army. That is a Jackson fork, which is the derrick I put up hay with. I am not able to follow along behind the team and drive it. I drive the team with a little cart that I am sitting on. I did not do any other work in putting up the hay besides driving this team on the [45] fork or derrick. I have attempted to ride horseback since I got out of the army, and I have ridden horseback. I can ride a gentle horse. When they go out in the pasture, then I ride a gentle horse. I can't ride a wild horse. It has got to be a perfectly gentle horse. I have put the saddle on sometimes, myself. To get up on the saddle, I have got to put my right leg in the stirrup and get hold with my hand on the saddle and pull myself up in the saddle and then throw my right foot over the saddle. I take my right foot out of the stirrup after I get up. At that time I am hanging on the fork of the saddle, and take my right foot out of the stirrup after I get up. If the horse would move, I would fall off and break my neck. I have not rode a horse often, but I have done it. After I get on a horse like that, I am just able to follow cattle in the road. I couldn't cut out cattle or run cattle, or run after cattle, or anything like that.

I have a car, and have driven my car. In driving my car I have got to put my right hand up here and pull out the gas feed, and then put my foot on the clutch and then change the gears. When I come to a hill, I have to shift gears at the end of the

(Testimony of Theodore Thompson.)

hill. I have to stop the car before I shift. I do not drive the car any distance. If I drive a distance, it affects me with nervousness and I hurt my back. The longest distance I generally drive is about twenty or twenty-five miles. When I drive that distance, at times I stop. When I get tired I stop on the road to rest. I have never attempted to drive in any [46] traffic in a city like Billings.

I got this money that I borrowed from Mr. Bue in cash, and put it in the bank. That is true of both the twenty-five hundred dollars and the eighteen hundred dollars.

The instrument which is shown me, marked for purposes of identification "Plaintiff's Exhibit 16," is my discharge from the army.

Mr. MOLUMBY: We will offer Plaintiff's Exhibit 16.

Mr. BROWN: We object to it as immaterial, and an incumbrance in the record. It is admitted in the pleadings that he was discharged from the army.

Mr. MOLUMBY: We offer it for the further purpose of showing his physical condition at the time he was discharged.

Mr. BROWN: We have no objection for that purpose, Your Honor.

The COURT: Very well, it will be admitted for that purpose.

(Testimony of Theodore Thompson.)

PLAINTIFF'S EXHIBIT 16,

was thereupon received in evidence, and is in the words and figures following, to-wit:

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY.

War Department,
The Adjutant General's Office,
Washington, April 1, 1921.

The records of this office show that this soldier served [47] in the St. Mihiel Offensive September 12 to 16, 1918; Meuse-Argonne Offensive September 26 to October 4, 1918; Ypres-Lys Offensive October 31, 1918 and that he was wounded in action October 31, 1918.

I. ERWIN,
Adjutant General.

TO ALL WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That Theodore Thompson #2,255,553—Private First Class, Company D, 347th Mach. Gun Bn.

THE UNITED STATES ARMY, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of Certificate of Disability per 4 Ind. Hq. C. D., Chicago, Ill. Aug. 4, 1919.

Said Theodore Thompson was born in Ogne, in the State of Norway. When enlisted he was 24 years

(Testimony of Theodore Thompson.)
of age and by occupation a Farmer. He had Blue eyes, Brown hair, Fair complexion, and was 6 feet 0 inches in height.

Given under my hand at U. S. A. Gen. Hosp. No. 26, Ft. Des Moines, Ia. this 13th day of August, one thousand nine hundred and nineteen.

C. W. HAVERKAMFF,
Lieut. Colonel, M. C. U. S. A.
Commanding.

Fort Des Moines, Iowa, Aug. 13, 1919.
Paid in full $130.80.

P. V. KUHN,
Captain, Q. M. C.

D. C. No. 278440.
Soldier entitled to reduced transportation from Des Moines, Ia. to Big Timber, Mont. [48]

ENLISTMENT RECORD.

Name: Theodore Thompson.
Grade: Private First Class.
Enlisted, or Inducted, Sept. 19, 1917, at Big Timber, Mont.
Serving in First enlistment period at date of discharge.
Prior service: None.
Keogh Quartermaster Intermediate Depot, Fort Keogh, Montana, May 1, 1921.

(Testimony of Theodore Thompson.)

Clothing issues this date 1 Gas Mask, 1 Helmet, 1 Poncho, 1 pr. Gloves, 1 cap Overseas, 1 Belt Waist.

FRANK BARR,
Captain
Quartermaster Corps, U. S. A.

Noncommissioned *offer*: Never.

Markmanship, gunner qualification or rating: Not rated.

Horsemanship: Not mounted.

Battles, engagements, skirmishes, expeditions: Belgium, Oct. 31, 1918.

Knowledge of any vocation: Farming.

Wounds received in service: Shrapnel wound of left knee.

Physical condition when discharged: Poor.

Typhoid prophylaxis completed Unknown.

Paratyphoid prophylaxis completed Unknown.

Married or single: Single.

Character: Excellent.

Remarks: No A.W.O.L. No list time under G.O. 31-1912 or G.O. 45-1914. Served in France and Belgium. Left U. S. July 5, 1918. Arrived in U. S. Jan. 1, 1919. Services honest and faithful.

Signature of soldier: Theodore Thompson. [49]

W. G. BUTLER,
Captain S. C., U. S. A.
Commanding Det. of Patients

(Testimony of Theodore Thompson.)

Silver Victory Button issued per Cn. 187 W. D. 1919.

Transportation Furnished. A. T. Hammer.

Union Station, Aug. 13, 19. Des Moines, Iowa.

Mr. MOLUMBY: If the Court please, at this time we now offer, for the purpose of the record, to surrender the policy of war risk insurance, being policy number K 310,168; marked "Exhibit 11," and the envelope "Exhibit 12."

Mr. BROWN: No objection, Your Honor.

Mr. MOLUMBY: We offer it, to be cancelled in the event the plaintiff prevails.

The COURT: It may be received.

Mr. MOLUMBY: And we also offer the exhibits now, Your Honor, for proving the portion that appears on the face of the policy and on the envelope in which it is contained.

PLAINTIFF'S EXHIBIT 11,

being converted government life insurance policy No. K 310,168, in the principle sum of Five Thousand Dollars, issued by the United States Government to Theodore Thompson, and effective from and after July 1, 1921, was thereupon received in evidence and is omitted from this bill of exceptions in compliance with Rule 10, sub-division 2 of the Rules of this Court. [50]

(Testimony of Theodore Thompson.)

PLAINTIFF'S EXHIBIT 12

being the envelope in which the above described insurance policy was enclosed, was thereupon received in evidence, and is omitted from this bill of exceptions in compliance with sub-division 2 of Rule 10 of the Rules of the Court.

Cross Examination

of the Plaintiff, Theodore Thompson

By Mr. BROWN:

I came to the United States in 1912 in the middle of April, and went then to the home of my cousin, Mr. Bue. At that time I was 19 years old. When I left Norway I had the equivalent of a Seventh Grade education in a Norwegian school. I could read and write the Norwegian language. As to whether I had attempted to study any English before coming to this country, knowing that I was coming; I did not have much chance to study any English. I did not try to do it, because I had to be out working and working for my living all the time.

I landed in the United States at New York, and came direct from New York to Mr. Bue's place in 1912. Between 1912 and the time that I went into the army I did not go to any school in the United States. I did not study any English in the United States. As to whether I had learned to speak the

(Testimony of Theodore Thompson.)

language at all when I enlisted in 1917, five years after I had come here; it was just what little that was talked, a few words, common words, right among the Norwegians. As to whether I needed an interpreter with me when I talked with [51] someone who did not talk Norwegian; I just had to talk by my hands or the best way I could. In 1917, when I went into the army, I did not have to either talk by my hands or have an interpreter. I could understand, but I could not talk to them. Maybe it is correct to say that I could understand, but I could not make anybody else understand me. I could not write the English language when I enlisted in the army, and I was unable to read. I was unable to write when I went into the army in 1917, except to sign my name. I could sign my name. Outside of that, I could not write. I did not go to any school in the army to learn English nor to learn to read and write. I did not learn to read and write in the army.

Referring now to Defendant's Exhibit 9 which is handed me, that is my signature on that exhibit. I observe the date here, September 10, 1919. At this time, when that paper was signed, this question was asked me, "Can you read newspapers in English?" to which I answered "Yes;" and this question was asked me, "Can you write a letter in English?" to which I answered, "Yes," on September 10, 1919. That was not a true answer to those two questions. I made that answer, if it was not true,

(Testimony of Theodore Thompson.)

because I must not have understood the question. I was dealing then, as I knew, with the Government, requesting vocational training at that time. That statement that I made at that time was not a true statement when I made it, because I could not read or write. I have not learned to read or write yet. I can read the common words, but I can't read any high words. [52] I read in a newspaper and understand some of it, but I can not understand it all. I know of dictionaries, and know what a dictionary is. I have looked into a dictionary when I have been doing some reading, to find out the meaning of words; but I go to considerable time. It takes considerable time.

As to my writing, I do not do any writing, I can't write a letter.

From 1912 to 1917, when I was inducted into the army, my occupation was working around on ranches and farming and around stock. As a matter of fact, I was herding sheep at times, too. I was herding sheep and other work. There were several different kinds of wages for herding sheep. I was receiving eighty dollars a month and fifty dollars a month for herding sheep. I really could not remember just how many months it was that I was receiving eighty dollars a month. As to whether it is a fact that there was one month in each year that I received eighty dollars, and that was the month of May; it was maybe one month, maybe two months. I could not remember now just how many months

(Testimony of Theodore Thompson.)

it was. And for the rest of the time I received fifty dollars, the other eleven months of the year. I received fifty dollars a month for some months. I could not say how many months of a year I did receive fifty dollars. Maybe it was eleven months of the year that I received fifty dollars, or maybe it was three months or maybe it was ten months; I couldn't say. I can't say, because I can't remember that far. I can't remember any wages that [53] I was receiving just before I went into the army. I can't really remember just how much it was.

When I first went into the army I first went to Camp Lewis. One night I stepped into some hole there during maneuvers. I had measles and mumps there. I was in the hospital for the measles and the mumps. I stepped into this hole before I had the measles. I could not say how long it was before I had the measles, but it was some before I had the measles. As to how it affected me when I stepped into the hole, and how my leg felt right after I got out of it; it was paining and hurting and sore. It pained me right in the knee joint. I could not tell right after it was hurt whether it was swollen or not, because it was dark at night, and I couldn't see anything. I looked at it after I got back to my barracks, but I couldn't see any swelling; but it was hurting and paining. It swelled some the next day. As to how much it swelled the next day; it seemed, like the swelling was getting tight around the knee joint. I could not tell how long it was swollen. I did not report that to any doctor in the camp. There were doctors there at

(Testimony of Theodore Thompson.)

that time and there was a hospital there at that time. My leg was hurting me at that time, but it was not hurting enough that I really thought I needed hospital care. I did not go right along performing my regular duties. I was staying in the barracks. I told the Captain my leg got hurt, and he says, "You better stay in the barracks a few days." I could not possibly remember how long it was that I stayed in the barracks. I stayed there [54] somewheres around a week. I could not say exactly if I stayed there as long as ten days; but it was around a week's time. I did not do any work while I was in the barracks. My leg was hurting me at that time, and I did not ask for any medicine from the physicians or from the doctors there in the hospital. I did not use any treatment on it at all. I reported it to no doctor there at Camp Lewis. I said that my leg has hurt me all of the time from that time up to the present time, and that is true. After I hurt this leg I went into the hospital and remained two months. My leg was not hurting me while I was in the hospital. I told Mr. Molumby that my leg has hurt me continuously from the time I stepped in that hole until the present time. That is true. It hurts by spells, once in a while. It does not hurt all the time, every day. It hurts for a week or two and then it hurts again. It does not go as long as a month without hurting. I was in the hospital with measles and mumps about a month or six weeks.

(Testimony of Theodore Thompson.)

Q. Well, it went for a month or six weeks at that time, without hurting, didn't it?

A. Well, I was on my back.

I can't remember whether it went for a month or six weeks without hurting while I was in the hospital. I can't remember whether it hurt or not. I can't remember whether I asked any doctor, while I was there, for any treatment for my leg at that time or not. I don't know if I did or not. I can't remember whether I did or did not [55] report to the doctor that I had been hurt at that time while I was in the hospital.

It was about three months after I left the hospital, after the measles and mumps, before I went to New York. Before I went to New York, during that three months, I had not been training very much in Camp Lewis. I did not do very much marching the last three months I was there. But whatever training and work my company did, I did too. I stayed in New York, or the camp to which I went from Camp Lewis, about a week, I would judge. I did not do any training there. Then I went over to France. Before I went up to the front line in France I trained about three or four months. I marched then in my training and was on my feet a number of hours each day. At times they worked hard, and I did that work. My knee was paining me then. It did not pain me every day. I did not ask any of the doctors for any treatment

(Testimony of Theodore Thompson.)
for my knee at that time. I did not report to them that I was suffering from my knee. I do not remember if I did or did not ask to be detailed to any lighter duty on account of my knee; I couldn't remember.

Then I went into the front line trenches with my company. There were a great many hundreds of other men up there. With reference to this water that I testified to having drunk; the other soldiers up there were drinking the same water that I was drinking, so far as I know. With reference to the food that I have testified that I ate; the other soldiers up there were being served the same food that I got. They got no different food than I got. I could not [56] really possibly say when it was that I first noticed the cramps in my stomach the first time. That is so long ago now that I don't remember, but I believe it was in the Argonne. It was just shortly after I went up there that I noticed those first cramps in my stomach. Each attack of those cramps would continue for ten or fifteen minutes. I was sick to my stomach and vomiting. It would probably not be more than once a day or twice a day that I would vomit. It would come on me sometimes worse than others, and I couldn't possibly say how many times they were coming on every day, because sometimes there would be one or two spells, and the next day I would not have any spells and the next day three or four spells, and so on.

(Testimony of Theodore Thompson.)

Q. Now, when did you first report that to the doctors in the army?

A. Well, there was no doctors there to report to. There was a doctor there when my leg was amputated. He came up when the leg was amputated. As long as a man could move around, he was in the fighting. I went back one time to a rest camp. There were doctors there at the rest camp. I was having trouble in my stomach at that time. I reported it to the doctors at that time. I asked for some medicine, and he gave me some medicine. He gave me salts. That is all the medicine I got. He did not give me any other medicine.

After my leg was taken off at the first aid station and I was sent back to the base hospital, I received no treatment for my stomach condition at the base hospital [57] that I know of. I do not remember if I did or did not ask for any treatment. I was so sick at the base hospital that I can't remember whether I was telling the doctors that I was having trouble with my stomach or not. I do not believe I did tell them that I was having trouble with my stomach. I don't remember now if I did or did not have trouble with my stomach coming back on the hospital ship. When I was in Fort Des Moines I was having difficulty with my stomach. I was at Fort Des Moines about six months. During that six months I was having trouble with my stomach off and on, having cramps and vomiting. I have told Mr. Molumby that I received no treatment for

(Testimony of Theodore Thompson.)

that. I do not remember if I did or did not ask for any treatment. I cannot remember now if I did or did not tell the doctors at Fort Des Moines that I had trouble with my stomach and had had it since I was in the Meuse-Argonne. I don't remember whether I told them about it. As to why I did not ask for treatment for my stomach, if I had this trouble; I had an examination by the doctor, and they ought to know what condition I was in. In those examinations the doctors asked me how I felt and I told them how I felt, but he says that was the stomach trouble and I would get over it. As a matter of fact, I did tell them about my stomach. I remember that I did tell them about it, now; and he told me I would get over it, but he did not give me any medicine for it at all, as I remember now.

Q. Well, in telling him about your stomach trouble, did you tell him how long you had had it? [58]

A. I told him where I got it from, and he said, "Oh, that will get over in time when you get proper food."

I told him when and how I got it, and where I expected it came from, and how long I had had it, and he said it would get over when I got proper food. He told me that it could not be cured by medicine, but could be cured by proper food. This was in Fort Des Moines, Iowa. I could not tell what time that was. I don't remember.

(Testimony of Theodore Thompson.)

I went into the base hospital in France in the first part of November, 1918, and I was in hospitals from the first part of November, 1918, until August of 1919, and the doctor there told me when I got proper food my stomach trouble would be cured. After I told the doctor about my stomach trouble and he told me that proper food would cure me, I did not see any change in the food they were giving me. I did not see any change in my stomach at all while I was in the hospitals from November, 1918, to August, 1919. The spells come on me off and on, and I still had the spells, still had cramps, still vomitted and still had diarrhea all the time I was in the hospital, off and on. And I told the doctor and he said that when I could get proper food that that would all disappear.

I do not remember now what he said with reference to my knee. He said something, but I don't remember what it was. My knee was hurting me in the hospital. It was not hurting all the time. It was hurting by spells from November of 1918 to August of 1919. I told the doctor about that, and he said he didn't know what he could do for it. [59] I told him I got strained there in Camp Lewis, Washington, and twisted my knee, and that it had hurt me at intervals ever since that time. And the doctor told me he didn't know what he could do for it. He did not give me any treatment. He did not give me any medicine or any liniment of any kind to put on there, as I remember. I do not remember if they did or did not take me down to

(Testimony of Theodore Thompson.)

X-ray that knee to see if anything was wrong. I believe I would have remembered it if they had. I told the doctor about my knee hurting, on several occasions; and each time he told me he couldn't do anything about it. I talked to more than one doctor about my knee.

Q. And each doctor that you talked to said, while you were in the army hospitals, the base hospital and in the hospitals in the United States, all of them told you that they could not do anything for it?

A. They didn't seem to know to do anything for it, because it was in the knee joint.

All of them told me that. I couldn't remember now how many of them told me that, but I know it was more than one.

When I was discharged from the army at Fort Des Moines, my left leg was off and I had this stomach trouble. My stomach was bothering me when I was discharged, and my knee was paining off and on and had pained me while I was in Fort Des Moines. And I was nervous. That is my signature upon the exhibit which is handed me, marked as the Defendant's Exhibit 7. The exhibit is sworn to by me on the 13th day [60] of August, 1919. That was the date of my discharge. At that time this question was asked me, "Nature and extent of disability claimed," and I have there only, "Amputation of left thigh middle third." At that time I did not mention this stomach trouble that

(Testimony of Theodore Thompson.)

I say existed, because they ought to know what ailed me; I was in the hospital. I do not know why I did not mention this stomach condition at that time, and why I signed this and said that was all that was wrong with me at that time. I do not know why I did not tell them about my nerves at this time, when I said that all that was wrong with me was the loss of my leg. I do not know why I did not tell them at that time about this pain in the knee that I had.

Q. Well, then, when you told them, when you signed this paper, that the only disability that you had was the one that arose from the amputation of your leg, you were not telling them the truth, were you?

A. I don't know what I was telling them.

I do not know why I did not tell all of it. I do not know of any reason that I had at that time for not telling the Government, when I was claiming compensation, that I had this trouble with my stomach. I do not know why I should withhold that information from them. If I was nervous at this time, I do not know of any reason for not telling the Government.

Mr. BROWN: If the Court please, I offer in evidence now the Defendant's Exhibits 7 and 8, which I have just examined the [61] witness about.

Mr. MOLUMBY: We have no objection.

(Testimony of Theodore Thompson.)

DEFENDANT'S EXHIBITS 7 AND 8,

being detached portions of the same instrument, were thereupon received in evidence, and are in the words and figures following, to-wit:

File No. C.....

Treasury Department
Bureau of War Risk Insurance.

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE.

Read With Great Care.

You must furnish the information called for in this application, and support your answers with proof called for in these instructions, as part of your claim under the act of Congress of October 6, 1917. Every question herein must be answered fully and clearly. Answers and affidavits should be written in clear, readable hand, or typewritten, and if you do not know the answer to a question, say so.

1. Forward with this application a certified copy of your certificate of discharge from the service. If at the time of your discharge or resignation you obtained from the Director of the Bureau of War Risk Insurance a certificate that you were then suffering from injury likely to result in death or disability, the original or a certified copy of such certificate of disability should be forwarded with this application as part of your claim.

2. You should also inclose a report by your attending [62] or examining physician. If you are

(Testimony of Theodore Thompson.)
receiving treatment in any hospital, sanitarium, or similar institution, you may submit the hospital report or record of your case, showing your physical condition, the origin, nature, and extent of your disability, and the probable duration of such disability.

3. If you have a wife or children, the fact that your wife and children are living must be shown by the affidavits of two persons, who should also state whether you and your wife and children are living together or apart, and whether or not you are divorced.

4. Your marriage must be proven by a certified copy of the public or church record, or if this is not obtainable, by the affidavit of the clergyman or magistrate who officiated, or by the affidavits of two eye-witnesses to the ceremony, or of two persons who have personal knowledge of your marriage. If either party was divorced from a former wife or husband, that fact should be shown by a verified copy of the court order or decree of divorce.

5. Ages of children must be shown by a certified copy of the public record of birth, or the church record of baptism, or if these are not obtainable, by the affidavits of two persons, giving the name of the child, the date and place of birth, and the names of both parents.

6. If claim is made on account of a stepchild, it must be shown by the affidavits of two persons whether such child is a member of the claimant's

(Testimony of Theodore Thompson.)

household, and if claim is made for an adopted child a certified copy of the court [63] letters or decree of adoption must be submitted.

7. If additional compensation is claimed for a dependent parent, relationship to such parent must be shown by a certified copy of the public record of the claimant's birth, or the church record of his baptism, or, if such evidence can not be obtained, by the affidavits of two persons. Whether or not the dependent parent for whom compensation is claimed is a widow or widower should be shown by the affidavits of two persons, who must state the specific amount of annual income from each separate source, the location and value of all property, real and personal, owned by said dependent, his or her physical condition, employment and earnings, and the amount of the disabled person's average monthly contribution to the support of the dependent parent. The parent claimed for should be one of the persons to make affidavit to these facts, if mentally competent.

8. The affidavits of two persons required in support of your claim should be made on the blank form on the last page of this application.

All papers which you send this bureau must bear your full name, former rank, and organization. The number C278440 must also appear upon each paper.

.....

Deputy Commissioner.

(Testimony of Theodore Thompson.)

(1)

PENALTY.

Sec. 25. That whoever in any claim for family allowance, compensation, or insurance, or in any document required by this act, or by regulation made under this act, makes any [64] statement of a material fact, knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

1. Full name, Theodore Thompson.

2. Address, Grey Cliff, Montana.

3. Under what name did you serve? Theodore Thompson. (a) Serial No. 2255553.

4. Color, White. Date of birth, July 31, 1893. Place of birth, Norway.

5. Make a cross (X) after branches of service you served in: General Service ..... Limited Service ..... Army X Navy ..... Marine Corps ..... Coast Guard .....

6. Date you last entered service, Sept. 19, 1917. Place of entry, Big Timber, Montana.

7. Rank or rating at time of discharge, Private 1 Cl.

8. Company and regiment or organization, vessel or station in which or on which you last served, Co. D 347 M. G. Bn.

8a. State fully any other service in the military or naval forces of the United States. None.

(Testimony of Theodore Thompson.)

9. Date and place of last discharge, August 13, 1919, Ft. Des Moines, Ia.

10. Cause of discharge. Certificate of Disability.

11. Nature and extent of disability claimed, Amputation of left thigh middle third.

12. Date disability began, October 31st, 1918.

13. Cause of disability, Shrapnel wound, severe, to left knee. [65]

14. When and where received. Incurred in action in Belgium, Oct. 31, 1918.

15. Occupations and wages before entering service, Farmer $60.00 month.

16. Last two employers: Carl Bue, Grey Cliff, Mont. 1915.

17. Occupations since discharge, dates of each, and wages received; if less than before service, why —none.

18. Present employer None.

19. Name and address of doctor or hospital treating you—U.S.A. General Hospital #26, Ft. Des Moines, Ia.

20. Are you confined to bed? No. Do you require constant nursing or attendance? No.

21. Name and address of nurse or attendant, None.

22. Are you willing to accept medical or surgical treatment if furnished? Yes.

23. Are you single, married, widowed, or divorced? Single.

24. Times married .....

(Testimony of Theodore Thompson.)

25. Date and place of last marriage .....

26. Times present wife has been married .....

27. Maiden name of wife .....

28. Do you live together? .....

(2)

29. Have you now living a child or children, including stepchildren and adopted children, under eighteen years of age and unmarried? .....

30. If so, state below full name of each child * * * None.

31. Have you a child of any age who is insane, idiotic, or [66] otherwise permanently helpless? None.

32. State whether your parents are living together, separated, divorced, or dead. Living together.

33. Give name and address of each parent living. (Mother) Anna Thompson (Father) Carl Thompson, Ogna, Norway.

34. Age of mother, about 50. Age of father, about 55.

35. (a) Is your mother now dependent upon you for support? Yes. (b) Is your father now dependent upon you for support? Yes. (c) If so, your average monthly contribution to your mother, $25.00. Your father, $25.00.

36. (a) Value of all property owned by your mother, $10,000.00 jointly. Your father, $10,000.00

(Testimony of Theodore Thompson.)

(b) What is the annual income of your mother? Unknown. Your father? Unknown.

37. Did you make an allotment of your pay? None.

38. If so, to whom? None. About $ None.

39. Give number of any other claim filed on account of this disability, and place filed—None.

40. Did you apply for War Risk Insurance? Yes.

41. When and where? Sept. 1917, Camp Lewis, Washington.

42. Insurance certificate number .....

43. Name of beneficiary (Father) Carl Thompson.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or insurance. [67]

THEODORE THOMPSON

(Signature of Claimant.)

Subscribed and sworn to before me this 13th day of August, 1919, by Theodore Thompson, claimant, to whom the statements herein were fully made known and explained.

F. G. CARPENTER,
2nd Lieut. SC. USA.
Notary Public.

Base pay $33.00.

Discharged Aug. 13, 1919.

W. G. BUTLER
Capt. SC. USA.

(Testimony of Theodore Thompson.)

(3)

(Page numbered 4 of said exhibit appears as a form for use as an affidavit; same not being filled out in any particular.)

Stamped upon page 4 of said instrument appears the following: "Claims, Compensation & Insurance. Aug. 18 1919."

The signature appearing upon the letter which is handed me, marked "Defendant's Exhibit 5," dated at Grey Cliff, Montana, December 18, 1919, written to the Bureau of War Risk Insurance, Washington, D. C., is my signature. I signed that. I state in that letter, "I was wounded in Belgium Oct. 31, 1918, by a high explosive shell, and suffered amputation of left leg above the knee, and minor injuries about the face," and that was true. Those injuries about the face are a scar on my face. I also say in the letter, "I note that a number of men similarly injured are drawing their insurance. I am writing you to inquire whether or not I am entitled to do likewise. I am drawing $30.00 per month compensation and am totally and permanently disabled [68] in so far as my former occupation of farming is concerned. My records in the army bear my name, Theodore Thompson (2255553), Pvt. 1st class, Co.D. 347 Machine Gun Battalion, 91st Division. I was discharged Aug. 13, 1919, at Fort Des Moines, Iowa. Very truly yours, Theodore

(Testimony of Theodore Thompson.)

Thompson." In that letter, in which I was detailing what happened to me in France, I said nothing about inhaling gas. I do not know what my reason was for not telling the Government that I received injuries or diseases in France by the inhalation of gas. I said nothing in this letter, in detailing my diseases and injuries, about suffering with stomach trouble from drinking water and from eating food that was not fit to eat. I do not know what my reason was for not doing so. I do not know why I concealed those facts from the Government. I said nothing in this letter about my having diarrhea. I do not know why I concealed that information from the Government. I said nothing in this letter about having received an injury to my right knee in Camp Lewis. I do not know why I didn't say so.

Q. Well, the reason was that you never received the injury, wasn't it; wasn't that the reason?

A. Yes, I got the injury; yes.

I do not know why I did not tell them about it. I don't know whether I was trying to tell them truthfully all that happened to me while I was in the army. I didn't tell them, is all. As to whether I was not telling the truth when I wrote this letter; I didn't tell them, I don't know why. My knee was still paining me at that time. I had [69] the cramps at that time, and I had the diarrhea at that time. I was vomiting at that time and was still nervous at that time, and I was claiming my insurance from the Government at that time.

(Testimony of Theodore Thompson.)

Mr. BROWN: We offer in evidence, if the Court please, the Defendants' Exhibit 5.

Mr. MOLUMBY: No objection—— Just a moment, Your Honor, however we do have an objection if it is offered for the purpose of re-opening the matter that is already decided.

Mr. BROWN: Not offered for that purpose, Your Honor.

The COURT: It will be received, if it is not offered for that purpose.

DEFENDANT'S EXHIBIT 5.

Grey Cliff, Mont.
Dec. 18, 1919.

Bureau War Risk, Ins.,
Washington, D. C.

Dear Sirs:

I was wounded in Belgium Oct. 31, 1918 by a high exlosive shell, and suffered amputation of left leg above the knee, and minor injuries about the face. I note that a number of men similarly injured are drawing their insurance. I am writing you to enquire whether or not I am entitled to do likewise. I am drawing $30.00 per month compensation and [70] am totally and permanently disabled in so far as my former occupation of farming is concerned.

My records in the Army bear my name, Theodore Thompson (2255553), Pvt. 1st. class, Co. D 347

(Testimony of Theodore Thompson.)

Machine Gun Battalion, 91st. Division. I was discharged Aug. 13, 1919, at Fort Des Moines, Iowa.

Very truly yours,
THEODORE THOMPSON

That is my signature on Defendant's Exhibit 10, a Government record dated July 6, 1921. And that is my signature under that, "Theodore Thompson." As to whether it is true that I state there over my signature, "I do hereby certify that I am now, to the best of my knowledge and belief, in as good health as I was at the date of my discharge or at the expiration of the grace period, whichever is the later date," on July 6, 1921; I do not know if it is that or not. I cannot read it. There are words in there that I don't understand. I do not understand this word here, "expiration," and this other word, "discharge." I do understand that it says there the date of my discharge and I understand that it says that I am in as good health as I was at the date of my discharge. I do not know whether that is true. I know that I was in the same health on July 6, 1921, as I was when I was discharged. As to whether I had told the Government in August 13, 1919, when I was discharged, "Nature and Extent of Disability, claimed, amputation of the left middle third," and that is all I claimed; that is all he has got [71] on there. I don't remem-

(Testimony of Theodore Thompson.)

ber if I was in good health on July 6, 1921. I could not remember whether my health was good or poor in July of 1921. At the time that I signed this document here I was telling the Government the truth to the best of my knowledge at that time. I signed it. That is my signature.

Mr. BROWN: Then we offer this (Defendant's Exhibit 10) in evidence, if the Court please, and we also offer the portion on the back; that is, the Doctor's certificate. We are offering the whole thing because counsel has requested the whole document.

Mr. MOLUMBY: No objection.

The COURT: It will be received in evidence.

DEFENDANT'S EXHIBIT 10.

Treasury Department
Bureau of War Risk Insurance
Insurance Division.

Date, July 6, 1921.

Amount inclosed $.....

REINSTATEMENT APPLICATION FOR TERM INSURANCE AFTER DISCHARGE FROM THE MILITARY OR NAVAL SERVICE.

Read carefully the following conditions: In all cases applicant should fill in all data down to first heavy double line.

(Testimony of Theodore Thompson.)

Name (print in full) Theodore Thompson.

Present Address, Grey Cliff, Mont.

Certificate No. T-1719358.

Date of Discharge, Aug. 13, 1919.

Army serial No. 2255553. [72]

Amount of insurance originally carried, $10,000.00.

Rank and organization on original application, Co. D 347 Machine Gun Bn.

Last month you paid your insurance premium, August, 1919.

Have you applied for compensation? (Yes or No.) Yes.

Are you drawing compensation? Yes.

If so, Claim No. C-278440.

Amount of insurance you desire to reinstate, $5000.00.

I desire this reinstatement to be effective (check below):

X The first day of the month in which the requirements have been complied with, or

.....The first day of the following month.

Pay your premiums promptly each month following your month of reinstatement.

REQUIREMENTS OF REINSTATEMENT.

Payment of Two Monthly Premiums on the amount of insurance you wish to reinstate, and—

If your insurance lapsed before July 1, 1920 (that is if the May, 1920, premium was not regularly

(Testimony of Theodore Thompson.)

paid or payment of premiums ceased prior to that month) and—

I. (a) Your month of discharge is not more than 18 months prior to the month of this application— (a) Complete Form 1.

(b) Your month of discharge is more than 18 months prior to the month of this application— (b) Complete Forms 2 and 4.

(a) Above expires December 31, 1920, inclusive. [73]

(b) Above expires June 30, 1921, inclusive.

If your insurance lapsed on or after July 1, 1920 (that is, in May, 1920, premium was regularly paid and failure to pay premiums occurred thereafter), and—

II. (a) Has not been lapsed for a longer period than 3 months— (a) Complete Form 2.

(b) Has been lapsed for 3 months and not more than 6 months— (b) Complete Forms 2 and 3.

(c) Has been lapsed for 6 months and not more than 18 months— (c) Complete Forms 2 and 4.

NOTE.—After properly completing the data necessary, return this application, together with two monthly premiums on the amount of insurance you desire to reinstate, to the Premium Receipts Subdivision, Bureau of War Risk Insurance, Washington, D. C.

(Testimony of Theodore Thompson.)

Form No. 1. (This form will not be used on or after January 1, 1921. To reinstate on or after that date use both Forms 2 and 4 (under I-a)).

I do hereby certify that I am now, to the best of my knowledge and belief, in as good health as I was at the date of my discharge or at the expiration of the grace period, whichever is the later date.

THEODORE THOMPSON.

(Signature of Applicant.)

July 6, 1921.

(Date of Signature.)

Form No. 2.

I hereby certify that I am now in good health.

THEODORE THOMPSON.

(Signature of Applicant.)

July 6, 1921.

(Date of Signature.) [74]

Form No. 3. Short Medical Certificate (To be completed by Medical Examiner.)

(Form No. 3 not used. Omitted from copy of Exhibit.)

Note.—Section 25 of the War Risk Insurance Act provides that "whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both."

Form No. 4. Full Medical Examination. (Medical Examination at Applicant's Expense.)

(Testimony of Theodore Thompson.)

Applicant should fill in all data to first heavy double line in presence of Medical Examiner.

(a) Date of birth, July 31, 1893, Age, 27. Occupation, Farmer.

(b) Family record.

	Age if living.	Health good or bad.	Age at death.	Cause of death.
Father	60	Good		
Mother	55	Good		
Number living	25	Good		
Brothers	23	Good	9 mo.	Not known.
Number dead	22	Good		
Number living	20	Good		
Sisters				
Number dead	18	Good	0	

(c) What operations have you had? Give dates. (c) Amputation Left leg, Lower 3rd Thigh, Nov. 1, 1918.

(d) Have you ever used wines or liquors to excess? (d) No.

(e) Do you now use or have you ever used opium, morphine, chloral, cocaine, or any other narcotic drug? (e) No.

(f) Have you ever been treated for any disease of the brain or nerves, throat or lungs, heart or blood vessels, [75] stomach, liver, intestines, kidney or bladder, or other genito-urinary organs, skin, bones, glands, ears, or eyes? If yes, state which and describe fully. (f) No.

(Testimony of Theodore Thompson.)

Signed by Applicant in the presence of the Medical Examiner on this 6th day of July, 1921.

THEODORE THOMPSON
(Signature of Applicant)

L. W. BASKETT
(Signature of Medical Examiner)

MEDICAL EXAMINER'S REPORT.

(To be filled in by Medical Examiner).

(a) Physical Characteristics: Sex, Male. Complexion, Fair. Color of hair, light. Color of eyes, Gray. General figure, Erect. Height (in shoes) 5 ft. 10 in. Weight (without coat and vest), estimated ..... lbs. or weighed, 149½#. Girth of chest: Normal, 38½; full inspiration, 40½; expiration 36½; Girth of abdomen, 33.

(b) Pulse: Before exercise, 74. Immediately after, 82. One minute later, 76. Two minutes later, 76.

Note.—Blood pressure is required (a) when applicant is more than thirty years of age; (b) in all cases where there is family history of apoplexy, heart disease, or nephritis; or where there is personal history of gout, rheumatism, syphilis, heart disease, or any evidence of kidney disease.

(c) Blood pressure (see note): Systolic 120, Diastolic 78. Instrument used, Tycos.

(d) Is there any irregularity in the heart action? No. Is there any atheroma? No.

(Testimony of Theodore Thompson.)

(e) After examination do you find any abnormality of the [76] lungs, heart, nervous system, skin, ears, eyes, or abdomen? If none, answer "No exceptions;" otherwise describe fully. (e) No exceptions.

(f) 1. Are you sure that specimen examined was that of the applicant? (f) 1. Yes.

2. Does applicant suffer from nocturnal urination? (f) 2. Yes.

3. If suspicion of abnormality, examine prostate. (f) 3. .....

Specific gravity, 1020. Reaction, Ac. Albumen, Neg. Test used, Heat and HNO_3. Sugar, Neg. Test used, Haines.

(g) Has applicant ever had syphilis, gout, or rheumatism? (g) No.

(h) Has applicant lost an eye, hand, or arm, foot or leg? L. Leg.

(i) Is ability to work impaired in any way? Yes.

(j) Any deformity or departure from normal in any respect? (j) L. Leg as above. Otherwise, No.

(k) Do you recommend the applicant for insurance? (k) Yes. If applicant is a woman, complete the following to double line. (Not filled out in form, and omitted from copy of exhibit.)

(p) Are you related to the applicant by blood or marriage? (p) No.

(q) Are the answers to these questions in your own handwriting? (q) Yes.

(Testimony of Theodore Thompson.)

The medical examiner must not be a relative of the [77] applicant by blood or marriage. The examiner must identify the applicant.

Examination made and signed at Examiner's office on July 6, 1921. (Name of State in which you are licensed to practice medicine.) Montana.

L. W. BASKETT,

(Signature of Examiner.)

Big Timber, Montana.

(Professional Address.)

(Stamped on the face of the exhibit, the following):

"Approved, Insurance Medical Section, Jul 19 1921 C# 278,440, By H. L. Mann, MTW."

This was an application that I made to reinstate or convert my five thousand dollars worth of Government insurance, to insure me for five thousand dollars; and I did that. After this application went in and the examination was had by the Doctor, I received an insurance policy, from the Government, in the principal sum of five thousand dollars. I do not know if the Government promised in it to pay my beneficiary, at my death, five thousand dollars, or to myself, if I became totally and permanently disabled after 1921, the sum of $28.75. I have read my policy.

I am still paying premiums on that policy. They take it out of my check.

(Testimony of Theodore Thompson.)

Since I left Des Moines, Iowa, and was discharged from the Government hospital, I have been taking several different kinds of medicine as treatment for my claimed stomach trouble. I have been taking them off and on right along. I started [78] taking several different kinds of medicine several years ago. The several different kinds of medicine that I have taken are salts and mineral oil and pills. I remember when this case was tried about a year ago down here. I remember that I testified as a witness at that time. I do not remember if at that time the following question was asked me and I made the following answer: "Q. Have you taken any treatments for stomach troubles since you left Fort Desmoines? A. Yes." I could not remember whether this question was asked me, "When?" and to which I answered, "I have been taking that off and on about once a month." I do not remember now if this question was asked me, "And what is the treatment?" to which I answered, "Salts." I would not say that I did not make that answer, and I would not say that I did make it. I do not remember that I testified a year ago that I had been taking mineral oil in addition to salts. I have not taken that medicine under any doctor's advice. I have been taking it by my own advice. Since August 13, 1919, when I was discharged from the army, I have been going in to Dr. Claiborn several times and getting pills from him for my stomach trouble. I went in to him several different times. I don't remember

(Testimony of Theodore Thompson.)

now when I first went in to him. I went in to him more than a year ago. I did not go in as a patient of his; I just asked him if he had some pills, as my stomach was in bad shape. He was treating me for stomach trouble more than a year ago. He gave me some pills to take home. I don't remember if a year ago, when I was a witness here, this question was asked me, referring to the time since I [79] was discharged from the army: "You have taken no medical advice and have had no medical attention, have you?" And I do not remember if I answered that question, "No, sir." I do not know and can't remember whether or not, at the time of the former trial I said that I had consulted Dr. Claiborn and he had treated me for this stomach condition. I believe I went to Dr. Baskett once, seeking advice and treatment for my stomach trouble, since my discharge from the army, in addition to Dr. Claiborn; but I am not quite sure. Other than Dr. Claiborn and Dr. Baskett, I have gone to Dr. Hill, at Big Timber. He gave me some pills for my stomach. That was about two or three months ago. I do not believe I went to any other doctors than those. I did not go to any other doctor, as I remember.

I never did go to any doctor to have my right leg treated. I never did go to any doctor to have my nervousness treated. I knew that the Government has maintained Fort Harrison, near Helena, for the accommodation of soldiers that were sick or injured. I don't remember if I have or have not

(Testimony of Theodore Thompson.)

ever asked the Government to admit me into Fort Harrison to give me treatment for my stomach condition or any other condition that I claimed I had. I don't remember if I ever asked them or not, and I don't remember now at all if I ever wrote them about it. I never did go there to receive any treatment, since my discharge from the army. I have stated that I have never requested, or don't remember whether or not I did ask the Government to take me into Fort Harrison and give me treatment; and I [80] never went there.

I do not remember that in about July of 1924, the Government sent me transportation and requested me to go into the hospital and I refused to go for treatment. I would not say that that did not happen, and I would not say that it did happen, because I don't remember. The signature on Defendant's Exhibit 17, which I am shown, is my signature, "Theodore Thompson." I must have signed that, if it has my signature on it.

Mr. BROWN: We offer in evidence the Government's Exhibit 17.

Mr. MOLUMBY: No objection.

The COURT: It will be received in evidence.

(Testimony of Theodore Thompson.)

DEFENDANT'S EXHIBIT 17.

Grey Cliff, Montana,
July 19th, 1924.

Mr. T. C. Busha, Jr.,
Helena, Mont.

Dear Sir:

I am returning herewith railroad transportation and other papers you sent me to admit me to the hospital at Helena, for the reason that I can not possibly leave my ranch at this time since I can not hire any one to take care of it for me. I wish to go later on however and I shall advise you as soon as I can make arrangements to leave here.

Yours very truly,
THEODORE THOMPSON. [81]

(Stamped upon the face of Defendant's Exhibit 17 are the following:) "Medical Section, Date 7-22-24. File V.H.R." "Transportation Jul 23 1924 File." "Received Jul 22 1924 Sub-District Office, Helena, Montana."

After having heard that letter read, it does not refresh my memory as to whether I did refuse to go to the hospital at that time and sent the transportation back. I can't remember it. I state in the letter, "I wish to go later on, however, and I shall advise you as soon as I can make arrangements to leave here." I do not remember that I ever did write them or advise them that I was ready to go

(Testimony of Theodore Thompson.)

to the hospital after this letter. That is my signature on the bottom of the letter, marked "Defendant's Exhibit Number 18," which is handed me, addressed to Mr. Theodore Thompson, Grey Cliff, Montana.

Mr. BROWN: We offer Defendant's Exhibit 18 in evidence.

Mr. MOLUMBY: No objection.

The COURT: It will be received in evidence.

DEFENDANT'S EXHIBIT 18.

United States Veterans Bureau

Helena, Mont.
Oct. 7, 1926.

Office of Regional Manager.

This Letter Refers to Your File Number:
In reply refer to: HM-1. C-278 440 [82]

Mr. Theodore Thompson,
Grey Cliff, Montana.

Dear Sir:

This office is in receipt of a communication from Dr. Claiborn of Big Timber, informing us that you are in need of hospital treatment. If you will notify us as to the time you will be ready to come to Helena for this treatment, hospital admission card and transportation will be forwarded to you for this purpose.

By direction

A. N. J. DOLAN,
Regional Medical Officer,
Helena Regional Office.

(Testimony of Theodore Thompson.)

U. S. Veterans Bureau,
Helena, Montana.
Gentleman:

Regarding my coming to the hospital for treatment, will say that I am trying to make final proof on my homestead, and it will be coming up November 29th, and as I am in no worse condition than I have been for months, I would prefer to wait till after that time, however if you insist I will try to come up now, with the understanding that I be allowed to return by that time.

Sincerely,
THEODORE THOMPSON.

(Stamped upon the face of said exhibit appear the following:) "Regional Office. U.S.V.B. Helena, Mont. Nov. 6, 1926," and "Medical Section. Nov. 8, 1926. File." [83]

I have testified that I went to Bozeman to take vocational training. I was given vocational training, or offered vocational training by the Government in agriculture. I could not say now if I did or did not ask the Government to train me in that course or line; but that is what they were giving me. I don't remember whether I did or did not make an application to the Government to be permitted to go to school to learn something. That is my signature, "Theodore Thompson," upon Defendant's Exhibit 9, which is shown to me and dated September 10, 1919. I signed that, addressed

(Testimony of Theodore Thompson.)

to the Federal Board for Vocational Education, Division of Rehabilitation. When I was asked here, "What is your trade or occupation?" and I answered, "Farmer," I do not know if that is a truthful answer or not. Sometimes it is spelled as farmers and sometimes it is spelled as ranchers. They asked me how long I had worked at it, and I said "About 15 years," and that is true. I had worked at it all my life. I say here, "I would like to learn some trade or calling by which I may earn my living." I would not say that I did not say that to the Government. It might have been true that I wanted to learn some trade or calling by which I could earn my living at that time; but I don't know, I couldn't say whether I did or did not.

Q. Well, did they ask you what other kind of work you could do, and you said "None"? Was that true, that you couldn't do anything except farming?

A. I wasn't farming.

I couldn't do that either. I do not know if [84] they asked me at that time, "What work do you think you could do if you were given training?" and I answered, "Crop Inspector—Meat inspector or some work of similar kind." I do not know if that was true or not. I could not say I could and I could not say I could not do that work if given training.

Mr. BROWN: We offer in evidence, if the Court please, the Defendant's Exhibit 9.

Mr. MOLUMBY: No objection.

The COURT: It will be received.

(Testimony of Theodore Thompson.)

DEFENDANT'S EXHIBIT 9.

Federal Board for Vocational Education
Division of Rehabilitation.

D. V. O. No. 10-8914.

Inquiry concerning soldier or sailor discharged from service.

Name, Thompson, Theodore. Age, 26 yrs. Race, White. Permanent mailing address, Grey Cliff, Montana. If you change your address notify us at once of new address. Where can you be reached by telegraph? Grey Cliff, Montana. Name and address of nearest relative or friend, (In United States) Carl Bue, a cousin. (In Norway) Karl Thompson and Anna Thompson, father and mother.

2. Where did you join the service? Big Timber, Mont. and Camp Lewis, Wash. Date of discharge, Aug. 13, 1919. Rank or rating, Private, 1st Cl. Organization, *Do.* D., 347th M. G. Bn. How much base pay did you get for your last month in service? $33.00. [85]

3. Are you single? Yes. Married? No. Widowed? No. Divorced? No.

4. Who is dependent on you (wife, number of children, etc.)? My parents are dependent on me, to work their farm & support them. How much did you allot them? $300.00 before entering the service.

5. Have you applied to the War Risk Insurance Bureau for compensation? Yes. Have you received

(Testimony of Theodore Thompson.)

any compensation from the War Risk Insurance Bureau? No. If so, give date of beginning and amount per month. None.

6. What is your disability? Lost the lower third of my left leg.

What is your present physical condition? Otherwise in good health.

7. How far did you go in grade school? 8th grade. In high school? None.

8. What other schooling have you had, such as college, army or navy school, night school, correspondence school, etc.? (Answer fully.) None but service in army.

9. Can you read newspapers in English? Yes. Can you write a letter in English? Yes. In what other language can you read or write? Norwegian.

10. What is your trade or occupation? Farmer. How long have you worked at it? About 15 years. What other kinds of work have you done? None.

11. What has your father's occupation been? Farmer.

12. What have you been doing since discharge (resting, attending school, working, etc.)? Nothing but taking [86] life easy.—No work.

13. If at work, what are you doing? None What are your present wages? None.

14. What is your present employer's name? No employer. What is his address?.....

15. Are you satisfied with the kind of work you are now doing? No.

(Testimony of Theodore Thompson.)

If not, why? I *would to* learn some trade or calling by which I may earn my living.

16. What other kind of work can you do? None.

17. What work do you think you could do if you were given training? Crop Inspector—Meat Inspector—or some work of similar kind.

First choice. Crop inspector.

Second choice. Meat inspector.

18. Remarks: (Give here any information relating to your present condition, prospects, and occupational preference that you think will be of interest.) Well, I have a dry land homestead on which I filed just before entering the Army in 1917. Derive no income from it as it is not improved. I have no income of any kind and can not do manual labor on a farm. I would like school training that would fit me for a government crop inspector, or a government Meat Inspector.

Your Signature,
THEODORE THOMPSON.

Date, Sept. 10th, 1919.

(Stamped on the face of said exhibit is the following):

"Received Sep 13 1919 Federal Board for Vocational [87] Education. D. V. O. #10."

I went to Bozeman to take vocational training in the month of January, 1920. I stayed there about three months, leaving some time in March in the

(Testimony of Theodore Thompson.)

early part. I left Bozeman and refused to permit the Government to train me because I could not learn anything, and I was also nervous and I couldn't learn, and I couldn't learn the language. There was nothing wrong with my mind at that time. I said I got disgusted. I tried for a little less than three months and got disgusted and quit and went home. They were training me along agricultural lines, training me to judge stock and lectures and taking machinery apart. It was machinery that is commonly used on a farm, farm machinery. They were training me how to take care of that and how to operate it. It looked to me like they were going to train me how to raise crops and how to run a farm and how to manage a farm, and how to direct the work of farming to be done, as I understand. I quit in less than three months and went home. I went to Carl Bue's place to stay. I asked the Government to give me some training in reading and writing in the English language, and they did not refuse to do that. As far as I know, they did not refuse. But I wouldn't let them do that. They tried it with me and I couldn't learn, because I didn't have the ambition to learn.

At that time the Government was paying me a hundred dollars a month, and they paid me a hundred dollars [88] a month all the time I was at Bozeman while they were trying to teach me. And I knew that they were going to continue to pay

(Testimony of Theodore Thompson.)

me a hundred dollars a month as long as I was in Bozeman taking training. I don't remember now if I did or did not leave that training voluntarily, of my own free will. I signed Defendant's Exhibit 1, which is handed me, and that is my signature, "Theodore Thompson." I could not say whether or not the answers to those questions are written in my own handwriting. I do not know and could not say whether I did or did not write them myself.

Mr. BROWN: We offer the Defendant's Exhibit 1 in evidence.

Mr. MOLUMBY: No objection.

The COURT: It may be received.

DEFENDANT'S EXHIBIT 1.

Federal Board for Vocational Education
Division of Rehabilitation
District No. 10

Minneapolis, Minn.

Theo Thompson

Training Information.

1. Why are you discontinuing training? I am going back on farm.

2. Do you wish to apply later to have your training resumed? If so, when? Yes. October.

Placement Information.

1. What are you going to do after discontinuing training? Farming. [89]

(Testimony of Theodore Thompson.)

2. Who will be your employer? Myself.
3. Just what will your job be? Farming.
4. What will your wages be? I don't know.
5. What will your address be? Grey Cliff, Mont.

We thank you in advance for the above information which will aid us in completing our records.

Yours truly,

C. A. ZUPPANN,
District Vocational Officer.

(Written on the back of Defendant's Exhibit 1 is the following):

I wish it to be understood that I am discontinuing training voluntarily & am going back to a compensation status in preference to a training status.

THEO THOMPSON.

The Government was paying me compensation when I left vocational training at Bozeman. They ask me there, "Do you wish to apply later to have your training resumed, and if so, when?" and I wrote there, "Yes, October." I do not remember, and could not say if I intended to go back to Bozeman in October. I could not say now whether that was a truthful answer I gave the Government or not. I never did go back in October. I could not remember whether I ever requested the Government to give me any further vocational training.

I signed that name, "Theodore Thompson," on

(Testimony of Theodore Thompson.)

the Defend- [90] ant's Exhibit 19, dated August 12, 1919, to the Federal Board for Vocational Education, and which is shown to me. That is my signature. I do not know if, when they were asking me regarding my knowledge of languages and the English language, I said that I understood the English language well. I guess I must have answered that I spoke the English language well and read the English language well on that date, August 12, 1919. I said that I wrote the English language a little. And back here, where they were telling me about the courses that they would give me, it states: "Specific occupation recommended by Vocational Adviser or Special Agent. Operating own farm, with a better knowledge of stock raising. His reasons. Owns 320 acres, and the education desired will be of advantage in carry on." I do not know and could not say if that was true that I had 320 acres at that time. It is true that I had a homestead in August of 1919. It also states: "Suggestions, if any, regarding arrangements for training. A supplementary course in English—reading, writing and arithmetic might be arranged to advantage, prior to taking up the course in Animal Husbandry." I did not know that if I wanted it that they were offering me there a course in English and reading and writing and arithmetic before I took up my training.

Mr. BROWN: We offer Defendant's Exhibit 19 in evidence.

The COURT: How old was the plaintiff at that time; 26? [91]

(Testimony of Theodore Thompson.)

Mr. MOLUMBY: Yes, the plaintiff was 26, I think, Your Honor. No objection.

The COURT: It may be received.

DEFENDANT'S EXHIBIT 19.

Federal Board for Vocational Education
Division of Rehabilitation.
Survey.

Transferred to D. V. O. No. 13 D.

Source of Case. USA. Gen. Hos. #26, Ft. Des M, Ia.

1. Name, Thompson, Theodore. Serial No. 2255553. Age, 26. Race, Wh. Rank or rating, Pvt. 1/cl. Organization. 1. Org. from which dischg. Co. D, 347 MG Bn. 2. Other Org. in which he served..... Entered service 9/19, 1917. Place. Big Timber, Mont. Dischg. 8/13, 1919. Place, Ft. Des M. Ia. Character of discharge: Hon. X, Ordinary....., Dishon. ..... From draft....., Other, CDD Form 535 att. P. O. address after discharge, Grey Cliff, Sweetgrass County, Montana. Home address, Same. Birthplace, Norway. Years in U. S., 7. Nationality of father, Norw. Occupation of father, Farmer. Single, married, widowed or divorced, Single. Number and status of dependents, None.

2. Disability (information obtained from statement of man): Date of occurrence, Oct. 31, 1918. Place of occurrence, Belgium. Nature, Shrapnel wound, severe, to left knee. Time in hospital, 40

(Testimony of Theodore Thompson.)

weeks. Per cent [92] disability, 2/5. (Army or Navy rating.) In line of duty? Yes.

3. Educational history:

	No. of years.	Grade reached.	Did he graduate?	Type of school, as public, private, parochial, etc.
(a) Elementary	8	8th	Yes.	Public schools of Norway.
(b) High or secondary	Never had any schooling in the U. S.			
(c) Trade, agricultural, commercial,				
(d) Night or correspondence				
(e) College				

Age on leaving school, 15. Reason for leaving school, work.

Major subjects studied in.....

Years of military service, 2. Years of vocational experience, 9.

	Time spent.	Subjects studied and proficience in each.
(f) Army, Navy or Marine schools	None	
(g) Hospital schools	6 Months.	English—spelling, reading and writing.

Any other education, None.

(Testimony of Theodore Thompson.)

Knowledge of languages:

	Understands—	Speaks—	Reads—	Writes.
English ("well," "a little," etc.)	Well	Well	Well	A little.
Other language, Norwegian.	Well	Well	Well	Well.

4. Vocational history (list occupations in sequence): [93]

(a) Occupations prior to service.....

(1) Just what did he do? Farming. Name and address of employer. For himself—took up homestead. No. of years, 5. Approximate dates, From 1912 to 1917. Wages, Amount.....

(2) Farmed in Norway until leaving there to settle in US.

(b) Occupation during service, Line duty.

(c) Occupation after leaving service.....

(d) Principal civil occupation, Farming.

5. W. R. I. *dats*:

(a) Compensation claim forwarded to Washington, Aug. 13, 1919. Compensation awarded.....

(b) Amount base pay last month of service, $33 Date of birth, July 31/93.

(c) Memoranda.....

Next of kin's, or nearest friend's name, (Father) Carl Thompson. Address, Evrebow, Norway—(Cousin) Carl Bue, Greycliffe, Mont.

6. Specific placement information: Is the man now employed? No.

(Testimony of Theodore Thompson.)

If employed, state whether suitably or unsuitably .....

If unemployed, what assurances or prospects has he? He has a homestead of 320 acres in Sweetgrass County, Mont. He will return home, and look around there, then when course is ready, be able to go to school.

(a) If employed or has definite prospects of employment, give the following information relative thereto:

(All blanks unfilled. Omitted from exhibit.) **[94]**

(b) If man is unemployed or unsuitably employed, and has no prospects of employment, give position desired or suitable for him:

(All blanks unfilled. Omitted from exhibit.)

7. Man's preference for future occupation (after receiving training):

(a) First preference, Agriculture—Animal Husbandry. Reason for it, Never done anything but farm—have place of own—want to know more of stock raising.

(b) Second preference. None. Reason for it. Don't think anything else would be as suitable.

8. Economic status.....

Bank account, None.

Credit, None.

Income, Unknown—none for two years at least.

Property, 320 acres homestead in Montana $4000.

Financial backing, None.

(Testimony of Theodore Thompson.)

Interviewed at Ft. Des Moines, Ia. on Aug. 12, 1919.

THEODORE THOMPSON,

(Signature of man certifying to the correctness of his statements as set down above.)

9. Personal characteristics, etc.:

(a) (1) Recreations, Movies, baseball, racing.

(2) Hobbies, None.

(3) Favorite reading, Western stories; daily papers.

(4) Smoke, Yes. (5) Drink, No.

(b) (1) Personal appearance, Neat. (2) Manner, Pleasant.

(c) Sociability: Unfriendly, No. Social..... Very social..... [95]

10. (a) Specific occupation (after receiving training) recommended by Vocational Adviser or Special Agent. Operating own farm, with a better knowledge of stock raising.

His reasons. Owns 320 acres, and with the education desired will be of advantage in carry on.

(b) Suggestions, if any, regarding arrangements for training. A supplementary course in English—reading, writing and arithmetic might be arranged to advantage, prior to taking up the course in Animal Husbandry.

(c) Is a position available for man after training? If so, give full particulars as to nature and location .....

(d) If no definite position is in view, is Vocational Adviser satisfied that prospects for employ-

(Testimony of Theodore Thompson.)

ment are good? Yes. Give reasons. Owns own farm.

WM. C. MUNSON

(Signature of Interviewer.)

Spl. Agt. Dist. #9.

Date Aug. 12, 1919.

11. Recommendation of Supervisor of Advisement: Agri. O. K.

JOHN B. BUTLER

(Signature of Supervisor of Advisement.)

Date Nov. 1, 1919.

(Stamped on face of above exhibit the following:) "Received Aug 18, 1919, Federal Board for Vocational Education. D. V. O. #9." and "Received Sep 4 1919. Federal [96] Board for Vocational Education. D. V. O. #10."

When I left Bozeman, I went to Mr. Bue's place. I do not remember how long I stayed there. I stayed there about a month. From there I went to Mr. Myrstol's place. I stayed there about a year, I would judge. That is a farm or ranch. I did not rent that place and did not farm it. There was someone living there with me. Off and on there was a fellow came to stay with me. I did not pay this man for staying with me. He was just staying with me for a place for him to live off and on. He was not doing any work for me. Reed Point was the closest town to this ranch. It was about six miles

(Testimony of Theodore Thompson.)
to Reed Point. During that year Mr. Myrstol came around off and on and hooked up a team and went to town and bought some groceries. I got the money to pay for the groceries from the compensation that the Government was paying me. I do not remember how much compensation they paid me during that year. They did not pay me as much as seventy-five dollars a month. I do not think it was that much. As to whether it was as much as sixty dollars; I could not remember now how much it was.

After I left that place, I moved up on my homestead, of 320 acres. That was in 1921 that I moved up there, I think. I had a team or horses on my homestead at that time. I had had four horses on my homestead when I went to the army. That is all the stock I had. I had this homestead of 320 acres that was not proved up on. It was dry land, with no water on any part of it. I do not remember just [97] what year it was that I commenced proving up on this homestead. I do not remember if I did or did not have it proved up on in 1921 when I went there. I did not have to do any work to prove up on the homestead. The improvements upon the land when I proved up were a house and barn, and I do not remember now if it was fenced or not. I believe it was, but I could not say for sure. I built the house before I went to the army, and I built the barn before I went to the army. I did not farm that land in 1921 when I went there. I never did farm that land. I do not remember how long I lived on that land without farming it. I do

(Testimony of Theodore Thompson.)

not believe I lived there until I sold it. As to whether I lived there as long as two years; I could not remember now how long I did live there. It might have been six months and might have been one year or two years, I don't remember. There was someone living with me there then. I was not exactly hiring someone to live there with me then. A man named Hans Omdal lived there with me. He lived there with me part of the time. When I say "part of the time," I mean he would be out to work for a week and then he would come back and stay with me for a week. I did not pay him any wages while he was there. He was just living there. I boarded him. I don't remember whether he bought any groceries for himself or not. I bought groceries, but I don't remember whether he bought any groceries or not; I couldn't say. Mr. Omdal took care of the horses while I was there. During those weeks he was away, the horses were just out in the hills, and nobody took care of them. [98]

From my homestead I went over to a place which Mr. Terland had. I stayed there about a year and a half or two years. I did not farm that place. I just lived there. I could not remember now what years I lived there nor what year I moved there. I think I left that Terland place in 1924, but I am not quite sure. I never did any farming while I was there. While I was there my horses were in the pasture in the hills, outside the place that I was on. Nobody was taking care of them. I did not rent the place; I was just staying there. Hans

(Testimony of Theodore Thompson.)

Omdal was staying with me there. I did not pay him for staying with me. He did not stay with me all the time I was there. He was out part of the time and then he came back. He would be out to work a week and then he would come back and stay a week. I do not know if he stayed with me all together as much as two thirds of the time that I was there. I don't remember whether he was there that much or not. While he was away, I took care of myself. I managed to get around and cook me something to eat. There was water just outside the house and I had to carry water. I carried it in a bucket. I had to carry what wood I needed. If he was not there, I had to take care of whatever house work there was to be done. I paid this man no wages for taking care of me and staying there. I was getting money from the Government to live on. I do not remember how much they were paying me then. I could not remember if they were paying me as much as seventy-five dollars a month. They were paying me enough to live on. [99]

I moved from my homestead down to this other place because my homestead was way out in the hills and it was rough to get in and out. That is the only reason I had for moving. During that time I did not move into town where I would be close to a doctor to get medical attention, if I needed it, because of my nervous condition. I could not live in town. I could not live in Grey Cliff or Big Timber.

After I left this place, I bought me another place of 320 acres, for which I paid $2500.00. That is

(Testimony of Theodore Thompson.)
the money which I say I borrowed from Carl Bue. I then had this 320 acres, and my homestead of 320 acres; 640 acres which I had and owned. As near as I can remember, I think it was in 1924 that I bought this 320 acres, in the Spring of the year. There was a little irrigable land and a little dry land, both, on this 320 acres. I could not just tell you how much irrigable land there, but there is 40 acres under cultivation. There was 40 acres under cultivation when I bought it; the rest of the 320 acres, which is pasture land, was not in cultivation. No crops were sowed to that 40 acres that was in cultivation, except a hay crop. When I bought that land I did not expect to harvest the hay crop, and I did not expect to harvest the hay crop when I lived there. I did not expect to farm the place when I bought it. I borrowed $2500.00 to buy a ranch that I did not expect to farm or use, because I wanted a home. That is what I wanted it for. I had a home on my homestead that the Government had given me, but that was way out in the hills [100] and inconvenient to get in and out. Thewe was a road to it which you can call a cow trail. I was buying this 320 acres as a home, and I did not intend to farm it at all. I am still living on that 320 acres and have never farmed it. I have never raised any grain crop off of it. I have raised a hay crop on it, ever since I bought it. I don't know when I changed my mind after I got on there and commenced raising hay. I just raised hay, that's all. There is only forty acres under cultivation now. I

(Testimony of Theodore Thompson.)

have not increased the acreage at all. I have been hiring the work done around the place, from the time that I went on there. I have hired a different number of men. In haying time, it requires more men. I hire as many as six men in haying. The length of time which I keep six men during the haying depends on how much hay there is. This year I only got a little crop of hay. In 1935 it was a little, small crop; I do not know how many tons, I did not measure it. I do not know from now until 1924 how much hay I raised on that place. I never measured it at any time, and I can't give any estimate as to how much it is. I probably have raised as much as 75 tons at one time on the place. I do not believe I have ever raised as much as a hundred tons of hay.

Q. Well, with your six men haying, how long would it take them to put up a hundred tons or seventy-five tons of hay?

A. Well, sometimes took them longer than others.

As near as I can remember, the longest time that I have been known to be there putting up my hay would [101] be about two weeks, or three weeks. I have been paying men two dollars a day and sometimes two and a half, and sometimes three; from two to three dollars a day, to about six men. They have all been getting from two to three dollars a day during different years.

I keep one man on the place, mostly, the year around. I have been paying him different wages,

(Testimony of Theodore Thompson.)

according to the way the wages run. I could not remember now how much I paid my one man in 1924, when I went on the place. In 1925, I paid that one man the year around about thirty-five dollars a month. I paid him by the month. I kept at least one man the year around that I paid thirty-five dollars a month approximately. The name of the man that I now pay thirty-five dollars a month and keep the year around is Mandius Thompson.

I have not done any work around the farm, excepting just feeding a few chickens and picking eggs off and on. But I have done that. My hired man has been doing the most of the chores around the farm. I have been doing the chores off and on since I have been there, but not all of the time. I have hired someone to do them.

Q. Nothing wrong with your arms; you have no trouble with your arms?

A. The arms can't get around to do it all.

I have no trouble with my back that I know of. Sometimes I do the cooking for this one man and sometimes he cooks himself. I do not take care of the house. Sometimes I sweep out a little bit in the house and sometimes he does. I do not do the most of it. As to whether I [102] hire a man to do the cooking and sweep out the place; he would cook off and on, and he was working outside.

I do not remember now what year I commenced to accumulate my stock, my herd of cattle. I do not know when I started my herd. I started my herd with two cattle, and I have forty head now.

(Testimony of Theodore Thompson.)

I do not know how long I have had forty head. I have sold off a few calves and steers out of the herd, in these various years. I own 640 acres of land now. I have 749 acres assessed to me now. I got one hundred twenty acres additional homestead; so now I own 749 acres and a herd of cattle. I do not know how many horses I own.

I tell these men that do the work on the farm what they are to do. I am able to do that. I can tell them what I wish to have done. I direct all the work, on the ranch, of the hired man. I tell him what to do and how to put in the crop. I do not see that he does it. I cannot always be there to see if he does it; but I know in a general way how he is doing the work around the farm. I have been and am able to do all of that. I have been doing that ever since I bought this 320 acres of land, and have been telling them what to do and how to do it. And that is true whether I have had one man working for me or six men. When I have six men, I tell all six men what to do. I did not own 320 acres of land personally when I went into the army. I had filed on 320 acres when I went into the army. I do not know and could not say how much crops I made out of my farm in 1924. I did not make any money [103] in 1924 from my farming operations. I do not know how much I lost. I know that I must have lost money. I could not say if I have or have not made any money off of my farm from 1924, when I started farming, up until the present time. I know some years I have lost money. I do not

(Testimony of Theodore Thompson.)

remember of any years that I made money. But I have farmed it each year since 1924.

I had a house built on this 320 acres that I spoke of buying. It is a log house; an ordinary house. I paid for that. I paid for the labor of building it. I had my brother build the barn that is on the place. The barn is worth six or seven hundred dollars, and the house is worth eight or nine hundred dollars, I would judge. That is all paid for. I fenced some of the place, but I could not say how much I did fence. I have not fenced it all since I have been there. The most of the 740 acres that I own is fenced, but not quite all; because there was an old fence in on it before. I have paid for that fence that I put in. I do not know how much I paid for that.

All during those years the Government has paid me compensation. It has paid me $99.00. That is what the Government is paying me now, at the present time. I could not say how long they have been paying me $99.00. As a matter of fact, instead of $99.00, I am getting $106.00 with my insurance premiums deducted by the Government, and that is the $5000.00 policy that I got in 1921. I could not say how long they have been paying me that $106.00. I know now that the amount of compensation that the Govern- [104] ment has paid me since I was discharged from the army totals more than fifteen thousand dollars to date. I know that to be a fact.

In addition to my cattle, I have got a few pet sheep, ten or twelve. I also have a few chickens and

(Testimony of Theodore Thompson.)

in the neighborhood of 44 head of cattle. I have a Pontiac automobile, which I drive myself; but I don't drive it at the present time. I also have a Chevrolet truck.

(Adjournment to June 24, 1936)

I do not remember if I was asked the following question and made the following answer when I was a witness on the former trial of this cause on the 3rd of April, 1935: "Q. Now, with reference to your stomach condition, you told me yesterday that you had never received any treatment or consulted any doctor because of that since you left Fort Des Moines, after your discharge, August 13, 1919? A. No, sir." I could not say and could not remember if the next question and my answer thereto were as follows: "Q. You haven't consulted anyone since then about stomach conditions, have you? A. No, sir." It seems to me like the following question was asked at that time and answered as follows: "Q. And you also stated, I believe, yesterday that the only treatment you have ever taken of any kind since you were discharged from the army on August 13, 1919, was, with reference to a stomach condition, that you took salts about once a month? A. Yes, sir." [105]

I signed the Defendant's Exhibit 20, which I am shown. That is my signature, "Theodore Thompson.

Mr. BROWN: We offer in evidence Defendant's Exhibit 20.

Mr. MOLUMBY: No objection.

The COURT: It may be received in evidence.

(Testimony of Theodore Thompson.)

DEFENDANT'S EXHIBIT 20.

Veterans Administration
Fort Harrison, Montana Facility.

June 2, 1934.
In reply refer to: HM-2
C 278 440

Mr. Theodore Thompson,
Reed Point, Montana.

Dear Sir:

Receipt is acknowledged of your artificial limb and the same has been inspected. It is not deemed advisable to repair this limb only for emergency use.

It is thought best at this time that arrangements be made to send you to Minneapolis for the fitting of a new artificial limb. At the same time repairs will be made for this limb if you can get along without the same. Will you please notify this office if you have one which you can use at this time for emergency purposes. Authority has been requested from Washington to send you to Minneapolis, and as soon as a reply is received you will be notified.

[106]

By direction,
L. E. BRISCOE, M. D.
Outpatient Medical Officer
Fort Harrison, Montana.

(Testimony of Theodore Thompson.)

(Written upon the bottom of above is the following:)

June 6, 1934.

Manager U. S. Veterans Bureau,
Fort Harrison, Montana.

Dear Sir:

Replying to above, will say that I now have an old leg which I can get by with for a short, however, I would appreciate your having the one I sent in repaired as I have depended on it and the old one I am now using is liable to go at any time.

As to going in being fitted for a new leg, it would be very hard at this time for me to get away and I would much prefer not to go until much later, say around October first.

THEODORE THOMPSON.

As to why it was hard for me to leave when I wrote this letter; the only thing I could say was hard for me to get away was on account of the heat. It is awful hard for me to travel in hot weather. It was hot in June.

Q. You thought it would be hot until October?

A. Hot weather, then it is hard for me to travel around in hot weather. [107]

As to whether it is a fact that the reason that I did not want to got then was because that was the busy time with my farming operations and I

(Testimony of Theodore Thompson.)

did not want to leave my farm and farming operations; I don't know that that had anything to do with it, because I had a man to do the farming. The farming operations were all over in October.

I have machinery on my farm. I have mowers and a rake and plow and harrow, the ordinary farm machinery. I bought it and paid for it. As to what it was worth when I bought it; it runs in all prices. Some of it was new and some of it was second hand when I bought it. My mowing machine was not new. One moving machine cost me $40.00 and another mowing machine cost me about twenty-five or thirty dollars. My rake cost me $60.00. I do not know now what my plow cost. I bought that after the war, but I don't remember what that was worth. My harrow cost me about $10.00. I have harness, of course, for my horses; and I built a ditch to carry water to irrigate my land with. I do not know and could not say how long that ditch is. It is not as long as three miles. I could not give the exact cost of it right now. I had one man working part of the time, practically all the time, for two months, and for about one month I had two men. I was paying those men two dollars a day. I could not say what is the value of the irrigated portion of my land per acre. I do not know if it is worth fifty dollars an acre. I do not know what the Assessor assesses it at. If it is assessed at $100.00 an acre, I could not say whether that is the value of it. [108] I could not say that that is not the fact, because I do not know.

(Testimony of Theodore Thompson.)

Redirect Examination

of Theodore Thompson by Mr. Molumby.

If I could get ten dollars an acre, I would sell it. I would sell it for five. As to this ditch, I did not build any ditches. All the work done on that ditch was done by hired help. I got the money to pay them from compensation. As to whether or not my ranch at any time has brought enough return to pay for my running expenses; I have had to use my compensation to get by. I would not have been able at any time any year to have run my ranch without the compensation I have been getting from the Government.

Defendant's Exhibit 9, which is shown me, and which I testified bears my signature, is made out in the handwriting of somebody else. That is not my handwriting. According to the date that it bears, it was apparently made out on September 10, 1919. I do not recall now where I was at that time. If that was a month after my discharge, I was living at Bue's. I do not recognize the handwriting.

I could not say in whose handwriting Defendant's Exhibit 7 is made out, which exhibit is shown to me. It is a fact that a portion of that is made out in longhand and a portion of it is made out in typewriting. This instrument bears date August 13, 1919, which is the date on which I was discharged from the army. I recall making out papers [109] of this kind before I was discharged or at the time I was discharged. I could not say and do

(Testimony of Theodore Thompson.)

not know whether this typewritten portion was in the paper when I signed it. That handwriting is not mine.

Defendant's Exhibit 10, which is shown me, appears to have been made out on July 6, 1921. I note that that is made out by typewriting and bears my signature, and on the back are notations made by Dr. Baskett in longhand. I did not make out that portion which appears in typewriting. I do not know and could not say if Dr. Baskett filled this form out at that time. I know I did not fill it out. There is not any of that exhibit appearing in my handwriting, except my signature.

Defendant's Exhibit 5 is shown me, which is made out in typewriting and bears date December 18, 1919, and has my signature thereon. I did not typewrite that letter. I do not know who wrote it. That is also true of Exhibit 17, which appears to be in typewriting, bearing date July 19, 1924. I did not write that letter. Exhibit 18 is shown me, which appears to be a letter from the United States Veteran's Bureau, on which there is typewritten a reply without date. I did not typewrite that reply.

Defendant's Exhibit 19 is shown me, which appears to be a form bearing date August 12, 1919, which was the day before my discharge from the army. I did not fill out that form.

At various times when I was examined by Government doctors, I told them about my stomach condition. [110] I am acquainted with Dr. Claiborn. I

(Testimony of Theodore Thompson.)

reckon he is a Government doctor. I informed him of my stomach condition. He has not been giving me treatment for it. I have been going to him to get some medicine for it, pills and so forth, off and on. That has been going on for a number of years. I am also acquainted with Dr. Baskett. He is not a Government examining doctor. I also received treatment from Dr. Baskett. Whenever I have been called in for examination I have told other Government doctors about this stomach condition. I recall Dr. Moore. I informed him of it. That was as far back as 1920. I do not recall Dr. Greene in Livingston. I could not remember his name, but I was called up there for examination, to Livingston. I informed him of my stomach trouble. On each occasion that I was called in to the Veterans Bureau at Helena, I informed the doctors who examined me there of my stomach trouble. I informed them concerning my trouble with my knee on my good leg, the one which I have left. I am not married now, and never have been married.

One of the exhibits speaks of some minor injuries to my face, and I stated it made a scar along my eye. A piece of shrapnel caused that scar along my eye. I got that piece of shrapnel at the time I had my leg blown off.

At the time I went into the army, or prior to the time I went into the army, I filed on 320 acres of land as a homestead, as near as I remember. I have

(Testimony of Theodore Thompson.)

spoken of an additional homestead of 120 acres. I believe I filed [111] on that after I came back from the army. The original filing and my additional filing was under the grazing act. The land was not fit for anything except grazing. When I sold the homestead to Carl Bue, I did not sell all of it to him. I retained 120 acres, which is my additional homestead. I do not remember now if I had to put any improvements on that additional entry when I proved up, or whether I proved up on the improvements that I had placed on my original homestead. I did put some improvements on the addition. I put a fence on it. I did not put anything on it outside of the fence. I did not do the fencing myself. I still have that 120 acres of land. I do not know what that land would be worth at the present time; about a dollar an acre.

That land that I purchased, and on which I live, consists of 320 acres. A part of that is also grazing land. About 40 acres of it is not. That forty acres is in hay. I cannot raise successfully, up in that country, any other crop than hay. The whole ranch is of the type of grazing land. I stated that I would be glad to sell it at five dollars an acre. I do not know what I could get for it. I am satisfied that I could not get more than five dollars an acre.

I stated that I bought 320 acres of this land at a different time. I paid $900.00 for that 320. The land has never been worth any more money than what I paid for it. As a matter of fact, I would sell it for as much now as I paid for it. I do not know if I

(Testimony of Theodore Thompson.)

could sell it for [112] that, but I would like to sell it for that. To buy this ranch I borrowed the money from my cousin. I do not know if, aside from the amount of money that I paid him back by selling him my homestead, I have paid him anything at all. I could not remember. I have not paid him anything to amount to anything. If I have paid him anything, it would be in the neighborhood of a hundred dollars. I have not been able to earn anything off of that land sufficient to pay anything on the indebtedness that I owe. There has never been any year since I got out of the army when my returns from the land were sufficient to pay for my help and maintain myself. The returns from my ranch in any year since I have been out of the army have not been sufficient so that, if I had not drawn my compensation from the Government, I could have paid the men for doing the work on the ranch.

I do not know in whose handwriting the first page of Defendant's Exhibit 1, which is handed me, is made out. I do not know in whose handwriting the second page is made out. I am sure that the handwriting is not mine. It is not my handwriting. This portion of it on the back of it reads as follows: "I wish it to be understood that I am discontinuing training voluntarily, and am going back to a compensation status in preference to the training status." I do not know what I mean by the word "status." I do not know what I mean by the word

(Testimony of Theodore Thompson.)

"voluntary." I do not know who made that out for me. It might have been one of the professors or officers at the school which I [113] was attending at Bozeman. I do not understand what the word "discontinue" means. I do not understand what the word "preference" means. I could not remember now if I did or did not understand, when this was made out, that I was winding up my training or quitting that training.

Yesterday, in answer to a question by Mr. Brown, when I was discussing the question of my taking training in reading and writing, he asked me something about whether or not the Government offered me some training in writing and reading, and I stated that they did. I do not know if they ever did specially attempt to train me in reading and writing. I got some training at Bozeman in reading and writing. That was part of my course there, or part of the training that they were going to give me. There were others in the class. There were a lot of men in the class, a lot of born Americans there in the class. They were trying to teach me to spell the words. They gave the instruction in classes or groups. I told you yesterday that I could not take the course because I did not have the ambition.

Q. Just what did you mean by that?

Mr. BROWN: I object to that, if the Court please. That is for the jury, and it is invading the province of the jury.

(Testimony of Theodore Thompson.)

The COURT: Oh, well, it is some expression of his that he wants to explain. I will let him say what he meant [114] by it.

Mr. BROWN: Exception.

A. What I meant by it was I couldn't keep up in the class. That was my meaning of it.

I could not keep up because I was handicapped because I didn't understand the language, and I could not read and write. There were boys in that class who were born and raised in this country. I do not remember if there were any other boys who were not born and raised in the country or not. As far as I know, I was the only one that had never had any training in English. I was not in that class all during the time I was at Bozeman. They gave me that during about the last three weeks that I was there. I stated yesterday that I was disgusted when I quit training. I was disgusted because of my nervous condition and it seems like I could not much learn the language.

Q. Now Theodore, you were on the stand all day —or all yesterday afternoon. Just tell the jury how just being there on the stand has affected you?

Mr. BROWN: That is objected to as argumentative and self serving. The jury can observe that.

The COURT: Well, of course you have gone into it so thoroughly in your examination and the examination of both doctors that it seems

(Testimony of Theodore Thompson.)

to me that you are making this unnecessarily protracted. I suppose he has been in pain. He has testified himself [115] that he has been in pain ever since he was in the army.

Mr. MOLUMBY: Well, I had another matter in mind, Your Honor.

Q. With particular reference to your mental condition, or your nervous condition or your memory.

Mr. BROWN: The same objection.

The COURT: Well, I suppose he was nervous. Were you nervous on the stand here yesterday?

Mr. BROWN: Exception.

A. Yes, sir.

It has affected my memory. My normal weight before I went into the army was somewheres around 170 pounds. I do not know now just exactly what my weight was while I was in the army; but I do remember the last time I weighed myself was before I went over seas in Camp Lewis, and I weighed 190 pounds.

In answer to questions by Mr. Brown, I stated that I was able out there on the ranch to tell the men what to do and keep on overseeing or supervising. I was not able to get out and see what type of work they were doing. I very seldom go outside of the house to boss the men. If the fence is down and I find out about it, I tell the men that the

(Testimony of Theodore Thompson.)
fence is down out there some place, I don't know. I just tell them how to fix it, is all. I never go out and see what kind of a job they do. When I was called to the army, I was at Mr. Bue's ranch. I was not there when I got [116] my call to go into the army. I was up in the mountains, 110 miles south of Big Timber. I came in that 110 miles on horseback. It took me one day.

WILLIAM GEORGE RICHARDS,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is William George Richards. I am engaged in the medical profession. I am a physician and surgeon, practicing here in Billings. I have practiced medicine since 1904.

Mr. BROWN: We admit the Doctor's qualifications as a regularly licensed and practicing physician, unless you want to further qualify him.

In the month of June, 1924, I was examining physician for the United States Veterans Bureau. I could not tell you exactly how long I was an examining physician for the United States Veterans

(Testimony of William George Richards.)

Bureau, but for some four or five years, I should think. As Examining Physician for the United States Veterans Bureau I have examined Theodore Thompson, the plaintiff; if he is the man who just left the witness stand. The instrument which is shown me, purporting to be a report of physical examination, bears my signature. That is a report of an examination that I, myself, made of Theodore Thompson. Using that report to refresh my recollection, and particularly directing atten- [117] tion to question number 11; we found in the first place that the man had had his leg amputated as the result of a gunshot wound. We found, also, according to this report, that his vision was reduced and also his hearing was reduced, and also he had abdominal symptoms which we interpreted as meaning that he had a colitis. By the term "colitis" is meant an inflammation of the colon, and the colon is the large gut. Persons do not sometimes speak of that as stomach trouble. If you will draw a line from the lower part of the abdomen on the right side, up as far as the middle of the abdomen, and then carry it off to the left and then from the left side of the abdomen to the bottom of the abdomen, you have the course of the colon.

As to the examination which I give a patient to determine some trouble in the colon; in the first place, you ask him what his symptoms are. And here we found that this man had dysentery in France. Dysentery is a frequent precursor of a

(Testimony of William George Richards.)

chronic condition of colitis. Then he gives his symptoms, and I have to depend upon what he tells me as his symptoms. He says he has constipation, alternated with diarrhea, with cramps in the abdomen. And those symptoms are very suggestive, even if not chronic, of colitis. Also gas on the stomach and vomiting at times. We take his word. That is his story. Then when you examine him, you find that he is tender along the course of the colon. So, if a man has had dysentery—and dysentery is bad diarrhea—which is caused by an inflammation of the gut, and especially if a man has had those dysenteries which they had in the [118] army, and then as a result of that dysentery he has abdominal symptoms with cramps and pains, and then the colon itself is tender, you are fairly safe in making a diagnosis of colitis. That tenderness is manifested in the same way that you manifest any tenderness. If I punch you in the abdomen; or not punch you, but if I feel your abdomen and push it and you feel it, that is tenderness.

It says here that my examination disclosed amputation of left leg above the knee, five inches above knee articulations. My diagnosis at that time of his condition is stated here as amputation of left leg above knee, colitis, and then appendicitis is put down with a question mark after it. My prognosis at that time, as stated here, is condition of leg permanent, abdominal condition doubtful. By the term "prognosis," we mean what are the prospects. For

(Testimony of William George Richards.)
instance, you can easily say that as to a man who had had his leg amputated the prospect of his not growing another leg is certain. The condition of the abdomen, we say, is doubtful. The condition of the abdomen is not as certain as the condition of the leg. He might get over his colitis, possibly. We do not know. Time would only tell. We could state the prognosis of the leg definitely, but we did not know the prognosis in the abdomen. The abdominal condition that I refer to is the colitis that I mentioned before. [119]

Cross Examination
of William George Richards by Mr. Brown.

I examined the plaintiff on the 2nd day of July, 1924, at Billings, Montana. I could not answer as to whether I had ever examined him before that time. As far as I know, I had not. I might have examined him before, because they used to send those chaps up from time to time to be examined, and we would send in a report each time. This is the only report you have, I hear, so all I can go by is this report. I haven't any independent recollection of ever having seen him before that time, because there were too many of them. Since that time, I examined him some time last year, when you had the trial here. It was a very superficial examination. Before July 2, 1924, I had never examined him to my knowledge.

In the answer there, commencing with number 11, it says, "Man of good general appearance, nu-

(Testimony of William George Richards.)

trition and musculature good." That means just exactly what it says. You look at the man and he looks fairly well, he is not half starved, and the muscles that he has got left are fairly good. That is plain English. It means his general appearance is good, shows no particular drawing of the face or signs of any great pain, or anything of that kind in his face. But that does not indicate that there is nothing there. We always put down the general appearance in the course of the examination. There is a sort of general survey, and after having made the general survey and stated the general appearance, then we dig into the matters of [120] detail; and the general appearance may be entirely wrong. But of course we do not put down "the general appearance is good" if it is not true. We say, "Abdomen well nourished," which means just exactly what it says, "well nourished." I can't explain "well nourished" any better than that. I am well nourished. If someone is skinny, he is not well nourished. Those words have no technical meaning with the medical profession; that is common English. We then say, "complains of slight tenderness at McBurney's point." McBurney's point is right here. (Indicating.) The report continues, "with no rigidity." The significance of that is that if you have an acute inflammation of the appendix, you will have tenderness over McBurney's point; that is to say, you will have the muscles over McBurney's point tense and hard.

(Testimony of William George Richards.)

The report also states, "Left leg shows amputation five inches above knee articulations. Well healed, cone-shaped stump, with a well healed eight-inch scar extending over end of stump, result of union of antero-posterior flap. Man wears a well built, artificial limb in good condition." As a surgeon, I would say that the result of the job of amputation that had been done to that leg was pretty good; that is, the technical amputation was pretty good. It was about as good a job as a surgeon could naturally expect; but he had lost his leg, which was not the surgeon's fault, of course.

At the time that I examined him I did not know if the abdominal condition that I found was curable or not. That is why we put down here, "Abdominal condition doubtful." [121] We recommended hospitalization, but everybody that goes to the hospital doesn't get cured, and we don't send everybody to the hospital because we expect to cure them. We have a try at it. The fact that a man goes to the hospital does not mean the doctor expects to cure him. I send a good many people to the hospital that I expect to die. I did recommend hospitalization. That was the best chance for him, so we recommended that in our report. At the very bottom of the answer to question 11 it says that hospitalization is recommended.

We have a question mark after "Appendicitis." That means that we were not sure that he had it. I would not say that a condition of appendicitis

(Testimony of William George Richards.)

will sometimes cause colitis. I would not put it that way. I would say more likely the condition that caused colitis would also cause the appendicitis, that the same condition caused the two. I would say that appendicitis might at times cause colitis, but the chances are that there is a common cause for the two, especially with a history like this, with a history of dysentery.

The history is the statement of the patient made to me, verified by the army reports. Every man that is admitted into an army hospital has a record kept of him, and those army reports are all supposed to be kept preserved. As a doctor, I did not have access to his medical report, but they had access to them in Washington. In making my diagnosis, I did not have access to them. I could not look at his army report, which is handed to me, and in a [122] few minutes determine if I can find any condition of dysentery there that I have just referred to. I am familiar with these army reports, in fact so familiar with them that I would like to have time to study this one. At your request, I would be glad to take this home and study it and then come back and testify about it. It would be necessary for me to have more time to examine it.

I do not think you explained this, however. There would not be any record of his dysentery here. If he had it in the army, there would not necessarily be a record of it.

Q. Well, this is the record, Doctor, of the Adjutant General's office?

(Testimony of William George Richards.)

A. I don't care. The Adjutant General's office can't put down anything that it doesn't know; and it says distinctly here that the man had dysentery in the Argonne in October, not treated. Lots of men had dysentery that wasn't treated.

Mr. BROWN: I move that that statement of the doctor be stricken as voluntary.

The COURT: You are not getting anywhere now. Just proceed with the Doctor as to his direct examination, and don't get so far afield.

Mr. BROWN: Exception.

This statement here was the statement that he made to me. [123]

Redirect Examination

of William George Richards by Mr. Molumby.

Q. Doctor, relative to the examination that you made about a year ago, I will ask you to state if you saw any particular change in the condition a year ago from what it was when you first examined him?

Mr. BROWN: Object to that as not redirect examination.

The COURT: Well, I will let him answer.

Mr. BROWN: Exception.

A. Will you state that question again?

Q. Did you notice any particular change in his condition a year ago from what it was when you first examined him in 1924?

A. As far as I remember, not.

L. W. ALLARD,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is L. W. Allard. I am engaged in the profession of medicine and surgery. I specialize in surgery and orthopedics. Orthopedics refers to surgery of the bones and joints; in other words, the spine and extremities.

Mr. BROWN: We will admit the qualifications of the Doctor as a regularly licensed and practicing physician. [124]

I am acquainted with Theodore Thompson, the plaintiff in this case, and have examined him in the course of my profession. I am shown what purports to be a report of physical examination made by myself, Dr. Richards and Dr. Morrison. Using that report to refresh my recollection, and summarizing the report as to what we found as to the condition of Theodore Thompson at that time, I would say that this board at that time, because of the specialties involved, divided the work of examination up. Dr. Morrison, a member of the board, examined for eye, ear, nose and throat and head conditions. Dr. Richards examined for medical conditions, and my duty was to examine for orthopedic conditions; in other words, any deformity or condition of the spine or extremeties which contributed to or was included in the complaint.

(Testimony of L. W. Allard.)

With particular reference to his orthopedic condition, from the standpoint of the physical complaint, it shows, according to the report, a gunshot wound in the left thigh received in Flanders October 31, 1918. The leg was amputated in the field hospital and he was later sent to different hospitals at Bellue, France; New York; Des Moines, Iowa, and so on, when he was discharged. It will also be noted in connection with this history that a dysentery which he had acquired in October, in the Argonne, was not treated at the time and continued to bother him while he was in the hospital with his leg wounds. The physical examination at that time showed the left leg amputated five inches above the knee articulations, a well [125] healed, cone shaped stump; with a well healed, eight inche scar extending over the end of the stump. This was the result of the union of the anterior and posterior flap. The man at that time was wearing a well built artificial limb in good condition. The report shows an impairment of vision, and the same as to his hearing. The report shows that his weight at that time, without a leg, was 138 pounds. At that time I concurred in the diagnosis by Dr. Richards, which appears on the report, regarding his abdominal conditions; and I made the diagnosis in reference to the leg, which appears in the report. I also concurred in the prognosis which was made.

I examined Theodore Thompson a year ago and I again examined him yesterday.

(Testimony of L. W. Allard.)

Q. What did you find on your examination yesterday, as compared to your examination in 1924?

Mr. BROWN: We object to that, if the Court please, as being too remote; and being, further, incompetent, irrelevant and immaterial; and not being connected up with any condition shown to exist except for the amputated leg as of the date of the discharge of the plaintiff from the army and the expiration of his policy.

The COURT: I think he would have a right to make a comparison of the plaintiff's condition a year ago and a few days ago, and with the examination of 1924. He [126] can, if he recalls what he found a year ago. He has a record of what he found in 1924. It depends upon his recollection.

Mr. BROWN: Exception.

Q. Can you answer that question all right, Doctor?

A. The examination yesterday compared with 1924 shows, of course, the condition of the stump as practically the same, in spite of the fact that there is a history of the subject having periods of disability due to the fact that the stump becomes inflamed and irritated from the use of the cups.

The cup is the socket of the artificial leg that the stump sets in. This part of his complaint is due to superficial irritation of the skin, probably due to perspiration and irritation of the stump in the

(Testimony of L. W. Allard.)

cup. It is not unusual for those things to occur. When the subject gets them, he simply has to rest the part and use ointments and alcohol and so on to toughen up the skin again before he can go on. He also called our attention to the condition of his other knee, which he had complained of before and described as a catch or lock, which requires him to stop for the moment and replace his knee, as he says, with his hands before he can go on. This condition dates back to the time when he was, I think, at Fort Lewis, when he strained his knee.

This is the examination made a year ago, and this is what he told me with reference to the condition of [127] the knee. When he mentioned this complaint, I asked him when this began. That is important in order to determine what is wrong. Upon examination of that knee yesterday, I found a knee that was normal in appearance, freely movable, but tender over the external side or inner side of the knee; this tenderness being pretty well localized and not marked by any redness or anything of that sort; but by feeling of something slipping under the palpating finger when the knee was moved. That indicates an irritation in the tissues outside of the knee joint, which may be caused by, for instance, an internal or semi lunar cartilage, one of the cartilages in the going being loose and slipping. I cannot say for sure if that, in my opinion, is what is the difficulty there. I do not know what is causing it. There is no way of definitely ascertaining that. The symptoms are not entirely characteristic of an

(Testimony of L. W. Allard.)

internal semi lunar cartilage slipping, but it is very suggestive.

Upon my examination of a year ago, I also examined the knee. As I recall it, practically the same symptoms and same things were disclosed by my examination a year ago. I think a year ago some crepitus was apparent in the knee. By crepitus is meant a sort of grating of the tissues in the sack around the joint when the joint is moved. It is like rubbing two pieces of leather together.

Q. Doctor, if a patient would have a knee that might have been sprained or injured, and subsequently suffered a loss of the other leg, would the additional strain of carrying his weight on his good leg where that knee had been strained, [128] aggravate that condition?

Mr. BROWN: I object to that as invading the province of the jury.

The COURT: Well, I think he could say whether it might have a tendency to subsequently weaken the other, or irritate the other knee.

Mr. BROWN: Exception.

A. I would answer that by saying that the added strain on a weakened joint would necessarily be apt to increase the symptoms.

Cross-Examination

of L. W. Allard by Mr. Brown.

I do not think this condition that I have testified that I noticed last year and a day or two ago, with reference to the man's right knee, is reported here

(Testimony of L. W. Allard.)
in the examination of 1924. I do not see any record of it here in the report. If I had found it, at least there should have been a record made of it at that time. It was my portion of the examination to examine the extremities or legs of Thompson at that time, and I did that.

CARL BUE,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Busha, testified as follows:

My name is Carl Bue. I reside southwest of Reed Point. I am acquainted with the plaintiff, Teddy [129] Thompson, or Theodore Thompson. He is some relation to me. I think he is a second cousin. I have known Mr. Thompson since 1912. That was when Mr. Thompson first came to this country. When he came here to Montana he came to my place. I think he came to Big Timber, and from there he came out to my place. Prior to the time that he went into the army he worked for me, up in the mountains, tending camp. Prior to his going to the war, between 1912 and 1917, I paid Mr. Thompson the running wages of from seventy-five to eighty dollars a month when he was in the mountain. That did not include his board. He did not have to pay his board; we furnished the board for him. We furnished the equipment for him to work with.

(Testimony of Carl Bue.)

When Mr. Thompson came to this country, he could not talk English. Prior to his going into the service, he associated mostly with Norwegians, who were in my employ and around that community. Mr. Thompson did not get an opportunity to learn much English, and I do not believe he learned a great lot of English prior to going into the service. He could not write.

When he came back from the service, I saw him shortly after his return. He came to my place shortly after he came back. That would be some time in the month of August; I don't remember. Describing to the jury as best I can his physical and mental condition at the time he returned from the service; it looked to me like he was quite nervous and he was always talking more or less about the war—had that in his mind. His leg was cut off and [130] he was getting around on two canes. He had two canes when he came to my place. I think he stayed at my place, when he first came back, something like four or five months, but I could not say exactly. He could not do anything while he was at my place because he was not able to. I think I would have had work there for him if he had been able to do anything. I employed him before he went into the service. When he came back he was not in such physical condition that I could employ him in the same capacity as I had before. After he left my place, I think he went down to visit some of the neighbors there. I think that

(Testimony of Carl Bue.)

would be Mr. Terland and Mr. Crone. I did not see him down there, I do not think.

I loaned Mr. Thompson $2500.00. The purpose of that was that he wanted to buy a place. As security for the money loaned, I took a mortgage on his homestead and also on that place he was buying. That money was paid back to me. I bought his homestead. I believe that was in 1924, but I am not sure. It was 1923 or 1924, or somewhere along in there, I guess. I would not say for sure, but I think it was 1924. The money that I had loaned him went for credit on the homestead at the time I bought his homestead. I credited that to him. I think that is twenty-four hundred dollars.

Later I loaned Mr. Thompson $1800.00. As security for that, I took the ranch that he bought—the first place that he bought. Mr. Thompson has not paid back that $1800.00. I think there is about seven months' interest on that $1800.00 which he owes me. [131]

During the time since the war I have seen Mr. Thompson off and on about once a month. I could not say whether Mr. Thompson made an effort to work when he came back. He has purchased land from me, and I loaned him the money to purchase land. I do not know if he has tried to run that ranch. He has always got some hired man there; he tried to run it, I guess. He has always had hired help to assist him on the ranch.

Q. But he himself has tried to run the ranch, hasn't he, and couldn't run it?

(Testimony of Carl Bue.)

A. No, I guess he didn't buy it for that. He bought it for a home, I guess.

He has not paid any of the $1800.00 back. At the time Mr. Thompson went into the service, he was up in the mountain tending camp at the time he was called in for the draft. That would be between ninety and a hundred miles, I believe, from Big Timber.

Cross-Examination

of Carl Bue by Mr. Brown:

Before Mr. Thompson went to the army, I employed him and paid him between seventy-five and eighty dollars a month when tending camp in the mountains. I paid him that amount for about three months of the year, or something like that. During the balance of the year I paid him around fifty dollars a month, I imagine.

I think I loaned him this $1800.00 in 1931. It was 1930 or 1931; I forget which. I charge him eight [132] per cent. interest. He has been paying that right along.

O. P. TERLAND,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Busha, testified as follows:

My name is O. P. Terland. My residence is Grey Cliff. I do not live right at Grey Cliff, but about

(Testimony of O. P. Terland.)

eight miles southeast from Grey Cliff. I know Theodore Thompson, the plaintiff in this case. I have known him since he came to the country in 1912. He lived in the community where I am when he first came to this country. I live about three and one half miles from Bue's place. When Thompson came to this country, he could not talk English. I could not say how often I saw him prior to the time he entered the United States army. I saw him once in a while. I met him out in the hills when he was herding sheep and sometimes in town.

I saw Mr. Thompson when he came back from the service when he used to stay down to Barstad's and also at Bue's before he came up to our place. But he used to come back and forth from one place to the other; so I do not know where I met him first. That would be just after he came back from the army when I saw him. I believe that was the year 1918. It may be 1919. I have forgotten just when it was. In describing just what his physical condition was; I would say he was different from what he was when he went in. He as in good condition when he went to the [133] army and when he came back he lost his leg and he didn't look like he did when he went in. I do not think he had a peg leg when he first got out, and then he got a wooden leg and he couldn't get around very good then. But now he is getting around a little better than what he did at first. But he don't get around like he should.

(Testimony of O. P. Terland.)

Mr. Thompson lived on some of my land for about two years. I did not rent that to him. He just wanted a place to stay and I let him stay there. He did not have any cattle on this place. He just had two horses, was all. I had a crop raised on it, but he didn't raise any crop. I harvested the crop.

I don't know how often I have seen Mr. Thompson since he came back from the service. I saw him every once in a while. We have been neighbors out there. Sometimes I see him every day. I have had occasion to observe the operations out on his ranch. I see him every once in a while. I have a place just above his place and live down below. He hires all the work done on his ranch. I have never seen him working on the place. He worked in the haying, driving the derrick team. That is all I ever saw him doing around the house. It does not require very much to drive the derrick team. I have a little kid that does that work. That is all it takes, a little kid I have at home. That little kid is about nine years old. That doesn't require very much work; just a little time to drive the team up and back a few steps. [134]

Cross-Examination

of O. P. Terland by Mr. Brown:

I have seen him do some of the chores around the place. He does the chores once in a while, but not very much. I have seen him do the cooking around the place. He cooks once in a while, but not very much while I was there. He always had someone there to do the most of the cooking.

(Testimony of O. P. Terland.)

He produces hay on the ranch. As to whether the ranch appears to be a pretty well-cared-for ranch; it is not bad, what there is, but there isn't so much of it. Most of it is pasture. The hay land produces well when he has rain, but when it don't rain, he don't get much of anything. The hay land produces about as much as the other hay farms in that community there. He gets just about the same yield of hay as the other farmers. His barns and house are kept up in good condition. That is all right. I guess the farm or ranch is managed and operated all right. It is not as good a place for its size as any in the community. It isn't very good. By that I mean that it is rough, and the land itself isn't very good; but it is kept up all right.

I guess I have seen most of his cattle. They are just common range cattle, I guess. They are just the same grade as the average cattle there in the community. He has bred up his herd the same as the other ranchers have, and they are well taken care of. I could not say whether he sold $400.00 worth of cattle last year. I could not say how much he sold them for, but I know he sold a few. [135]

Redirect Examination

of O. P. Terland by Mr. Busha:

I do not think this place that Mr. Thompson is on is such a ranch that a man could make a living off of it.

O. A. NEPSTAD,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Busha, testified as follows:

My name is O. A. Nepstad. I reside at Shelby. Prior to residing in Shelby, I resided in Big Timber and Grey Cliff. I am acquainted with Theodore Thompson, the plaintiff in this case. I have known him since 1912, when he used to work for Mr. Bue and myself. That was a partnership of Bue and myself. He used to work on the ranch and herd sheep and tend camp. The pay for that work used to be different wages. Herding would be somewheres around fifty dollars a month, I should judge. It was different prices in different years, and they would always get better wages for tending camp up in the mountains. Up there they would be paid as high as a hundred dollars a month. I do not remember just what they were paying in 1917 at the time Mr. Thompson went to war, but I know afterwards they were paying as high as $150.00 a month for herding sheep. I knew Mr. Thompson between 1912 and the time he went to the army. I did not see him so often, because he was generally working, but I had an opportunity to converse with him once in a while. Mr. Thompson did not talk [136] English very much. Mr. Thompson was mostly around the ranch there when he was not herding sheep. The rest of the men that used to work there were his friends and fellow associates. They were

(Testimony of O. A. Nepstad.)

of different nationalities. They were mostly Norwegians, and conversed in Norwegian mostly. I never had to do any writing for Mr. Thompson.

Subsequent to his discharge from the army, I saw Mr. Thompson first when he came up to Big Timber. I was living at Big Timber at that time, and I think he came up from Bue's. I cannot say exactly the date when that was, but it was some time about October or November, 1919. I could not say exactly what his physical and mental condition was at that time. He did not look as good as he used to, and he was walking with crutches then. I owned a store in Grey Cliff and Mr. Thompson traded there. I would see him when he came in to trade there. Mr. Flatum was there running the store after Mr. Thompson came back from the army. I was in Big Timber then, in the bank. That was the Commercial Bank and Trust Company. While I was in the bank Mr. Thompson borrowed money off and on. At times he borrowed some from me personally, in amounts of one or two hundred, or something like that. He would come in sometimes to get a few dollars for certain things and then he would come and pay it back. It is pretty hard to tell you how much he did get. He had his bank account in our bank. I was vice-president in the bank. I have been to Mr. Thompson's ranch, but I do not know how he operates the ranch. I do not know much about that. [137]

(Testimony of O. A. Nepstad.)

Cross Examination

of O. A. Nepstad by Mr. Brown.

Thompson was considered a great credit risk by me in the bank for a small amount, for the amounts that we loaned him. Of course, when sheep herders were getting $150.00 a month, that was before the war. We have never paid that since. I have been on Mr. Thompson's ranch and I have a ranch of my own. As to how the ranch appeared to me, with respect to being well managed or otherwise; I have not looked around the ranch much since Mr. Thompson got it. I have been up there a few times since he has been on it, but never looked it over.

LEO OVERFELT,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Busha, testified as follows:

My name is Leo Overfelt. I reside at Big Timber, Montana. I know Teddy Thompson or Theodore Thompson. I have known him since August, 1917. The way that acquaintanceship came about, I guess he heard that I was leaving for the army, and Mr. Thompson went to the army with me. We served together in the army at Camp Lewis and over seas, in the 347th Machine Gun Battalion, 91st

(Testimony of Leo Overfelt.)

Division. We were both in that battalion when we were stationed at Camp Lewis, and we went over seas together. While I was in Camp Lewis I knew that Mr. Thompson was around the quarters there, but I could not say just what it was for. I really did not associate with him much at the time, you see; but [138] I noticed him being around the quarters for several days, but never learned what it was for. I went up to the front with Mr. Thompson. While at Camp Lewis I knew that Mr. Thompson was in the hospital, but I do not know what it was for. When we got over-seas I went up on the front with Thompson. We were together on the front lines about eight or ten days. We were on the St. Mihiel front line, and from there to the Argonne. I saw Thompson at St. Mihiel, and I saw him in the Argonne.

When a platoon is spoken of, it means one third of the company; the first, second and third platoons of the company; and the company consisted of about two hundred men. A platoon would be a third of two hundred but I would have to have a pencil to figure out how many that would be. So that, we were together most of the time.

I was wounded. Prior to the time I was wounded, the food that was served to us on the front line was "corn willie" practically, and hard tack. It was corned beef, or "corn willie" we called it. We did not have any water sometimes. We got our water while I was on the front line just any place we

(Testimony of Leo Overfelt.)

could, which would be along in a coulee or shell hole or any place you might be able to get it. The condition of that water that we were drinking was poor. We were not supposed to drink it, because it was impure. It was rain water or springs or anything that you might be crossing at the time. I drank some of that water. From the water or food or something, I practically always had diarrhea. It was a bad enough case [139] of diarrhea to make you quite weak and a sickened condition. I lost weight from having it, and all of them that I saw did. You wouldn't hardly recognize some of your own men in the company. I was wounded before Mr. Thompson was. When I returned to this country, if I remember right, I saw Mr. Thompson some time in September, 1919. At that time he was on a cane or a crutch and he walked with a limp, and he looked quite thin, he was run down, and he did not look like himself before he went into the army. He seemed nervous and seemed to stutter a little when he talked, or something of the kind. His lips would quivver and tremble.

I have had occasion to see him since quite often; maybe once a month. From the condition as I described it in 1919 and his condition now I do not see that he has changed much. He still looks as bad as he ever did.

Cross Examination

of Leo Overfelt by Mr. Brown.

He looks as bad now as he every did. My occupation is farming. I work on a farm. Between the

(Testimony of Leo Overfelt.)

Government and myself, I own my own farm, like most of those places. I was over-seas. I spoke of having the diarrhea over there. I had it quite a while, until the time I was wounded and was in the hospital. I had it for two months or better. After that the condition cured up, in a way, so that you didn't have it so badly. You seemed to have after effects so that your stomach would be in a weakened condition for some time. [140] I would not say that that continued for some time and then it got all right. Mine is not all right yet. I am troubled with diarrhea sometimes.

I have lived around Big Timber practically all of my life since I was three years old. I was not a witness in this case last year. I was living at Big Timber last year, in April, 1935.

ADOLPH MYRSTOL,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is Adolph Myrstol. I live six miles southwest of Reed Point, close to where Theodore Thompson lives. I have known Theodore Thompson since 1912. I was not born and raised in this country. I am a Norwegian. I came to this country in 1909. From 1912, when Theodore Thompson came to this

(Testimony of Adolph Myrstol.)
country, until 1917, when he enlisted, I know for whom he worked. He worked for Mr. Bue and Mr. Nepstad. The type of work which he was doing was ranch work and handling sheep and tending camp and so on and so on. I worked with him during that period, from 1912 to 1917. During that period, from 1912 to 1917, he did not have opportunity to associate with many people that talked English. We people who were working there on that ranch were mostly Norwegians. He never could talk good English. When we conversed there on the ranch, we talked Norwegian.

I was in the army myself. I remember when [141] Theodore was called into the army. I was called at the same time. When we were called in, we were way back there in the Bull Mountains. It was named the Beartooth Mountains at that time, and in fact I think it is yet. It was a few miles from Yellowstone Park. I call it 110 miles from Big Timber. We received word up there that we were to go in to Big Timber to go into the army. Mr. Nepstad and Mr. Bue sent two men up there to take our places. The men got there along about sundown, in the evening. If I remember right, we left quite early in the morning, about sunrise, on horseback; and we made it in to Big Timber that night. We arrived at Big Timber at eleven o'clock, I remember very well.

Theodore and I did not go into the same outfit in the army. While we were in the army we saw

(Testimony of Adolph Myrstol.)

one another. I saw him at Camp Lewis on a few occasions. I went over-seas first. We were both at Camp Lewis together about two or two and a half months; I could not say. I do not recall his being placed on quarters there. I was not there at that time. I again saw Theodore, I would say, the latter part or middle of September, 1919, after we had both gotten out of the army. When I saw him after he got out of the army, I would call him in very poor condition. The man was nervous and excited when he saw me. To me he looked rather skinny and nervous. As to how his nervousness showed itself; I am not a doctor to really explain that, but anyhow, he was a different man altogether from what he was when he enlisted. If you talked to him on some subject, he would start talking about some- [142] thing else. It seemed like the least little move was made was excitement, and his face turned white as a sheet.

He afterwards lived on my place. That was in 1921. I would say he lived there a period of a year and a half or a year, somewhere along there. I do not know for sure. I was not married at that time. I was using the place at that time and lived there with him part of the time. The rest of the time I was working for Mr. Bue part of the time and was living away from home, and I was down there about five times a week in the evening. He had absolutely no work to do there on my place, and paid no rent. I just let him live there and

(Testimony of Adolph Myrstol.)

have a place to stay. With reference to the wood that was necessary for cooking and heating, he did not chop the wood and saw the wood. I had quite a little wood split up there for my own use, and I told him to go ahead and help himself.

Since then I have not done some work for Theodore on his place. I have lived with him on his place and have seen him up there. I saw him off and on up on his place quite often, especially in the Fall when I am riding for cattle up that way. I stay there at night off and on. I never have seen him do any work up on his place. He did not do any work. I have seen him ride a horse. I only saw him get on a horse once or twice, or maybe three or four times; but it is a very gentle horse and he leads him up to a rock or stump or cut bank. He places the horse right, and he has a funny way of getting his right foot into the stirrup, and just about all the movements he goes through [143] to get in the saddle I just couldn't describe or explain; but anyhow, he gets on the horse different from anybody I ever saw, or different than I do, anyhow.

I have been with him when he drove a car. When he drives a car, he uses his right hand or left hand for the throttle and gas feed, and uses his right foot, which is his good foot, on the brake or on the clutch; and when he gets to a hill, he has to stop and shift gears.

No Cross Examination.

JAMES R. DAVIS,

a witness in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is James R. Davis. I have been living for the last three or four years with Teddy Thompson. I have known him since 1924. During the time between 1924 and the time I began living with him, I would say I saw him about once a month. Since I have been living with Mr. Thompson, I have been doing the work around the ranch when he has it, if he just needs the one man. As to the work that is to be done on the ranch; he just puts in the crop in the fall and cuts rye in the summer time for hay. There is some alfalfa in in the bottoms. Excepting for putting up the hay, I have done all the work that is done on the ranch while I have been there. During the haying season he has to have more men. This hay land is not all in one [144] piece; it is in different patches. The area of the largest patch of hay land that he has there would be about twelve acres. There is about forty acres, altogether, of hay land.

I have seen Teddy attempt to ride a horse. I heard the way he described how he got on a horse here. That is true. I have seen him drive an automobile. I have heard Mr. Myrstol describe the way he drove an automobile. What Mr. Myrstol has to say with reference to that is true. With reference to

(Testimony of James R. Davis.)

Theodore's stomach condition, I have noticed that he has to diet himself when he eats. He can't eat anything with acid, like fruit or sugar, anything that is sweet. I have noticed that he has been subject to frequent attacks of vomiting. I do not just remember how frequently those attacks come on him; but it is once or twice a month some months, and some months it goes longer. Those attacks make him weak, and he looks yellow in the face. I have observed him at times when he has been up and around on his feet. When he walks, his right knee swells up, on his good leg, and he can't hardly walk on it. That happens whenever he is on it for any length of time.

I know this ranch that Theodore is on. Part of it is neither grazing land or farm land. It is too rocky and rough, there is no feed to it. The bottom land that he cultivates is about the only good land on it. Around forty head of cattle could be run on all the land he has on the place and be taken care of properly. I have done ranching myself. As to whether it is possible to make a living off of forty head of cattle on such a place as he has got, [145] and hire the work done; I do not know whether it is possible or not. I could not make it. I have never known of it to be done.

Cross Examination

of James R. Davis by Mr. Brown.

My testimony is that a man can't make a living on this 320 acres of land that Thompson has got. I

(Testimony of James R. Davis.)

do know that he has in all 750 acres of land, and it is my testimony that he could not make a living out of the whole 750 acres, with forty acres of agricultural land that he can raise hay on. It can't be done. I have lived there on this ranch about three years, off and on. I have been there most of the three years. I would say that I have been there as much as a year and six months out of the three. I have worked there for him for wages during that entire time. He pays me thirty-five or forty dollars a month. It is thirty-five and forty dollars a month. In the Fall of 1934, I think he paid me thirty-five for one month. He started paying me forty last Fall. He is not still paying me forty dollars. I am not working there now. I quit there in December. He did not pay me forty dollars up until December every month. He just paid me forty dollars in the Summer months. During the rest of the time he did not pay me anything, just board. I got no wages then. During the three years that I have lived with him I have not received my thirty-five and forty dollars a month during the Summer months, not during all the Summer months; only when [146] he has got work, just when he puts in a crop in the Fall; and I got two dollars a day for haying. The rest of the time I have just lived there and got my board, doing the chores. I would say that I was paid not over two months during the Summer. I do not know if that is the arrangement that he has had with the other men that have stayed there too.

(Testimony of James R. Davis.)

As to the kind of buildings, etc., his place appears good. They are well kept up. His crops appear to be well cultivated, and the entire ranch appears as though it is properly operated. I would say that the crop produced each year on the land that is cultivated is as good a crop as is produced on like land around in the community by the other farmers. It produces about its maximum for that type of ground. I have cultivated that land myself, and it has been under the supervision and direction of Thompson. He has told me how to do it. From what I have observed, it appears to me that he knows how to operate that property and give directions for its proper management. He knows how the soil should be tilled to raise a crop. He can direct the men what to do in order to farm it. He can do that, according to my observation and he has done it for years. He has managed and supervised that property.

Redirect Examination

of James R. Davis by Mr. Molumby.

With reference to supervision, he does not walk over the hills to see if the fence is kept up. He has never gone out over the fields while I was there, and has not gone [147] out over the fields to look over the fence. He has never rode a horse to turn cattle or to drive cattle. He has never harnessed a team while I was there. He has never rode a mower while I was there. He has never rode a rake while I was

(Testimony of James R. Davis.)

there. He has walked across the irrigated land, to see how it was irrigated, while I was there. He has never walked up to the pasture part of the land to inspect it, over the hills, while I was there. In supervising my work there, Theodore never did any more than to go out and tell me to cut the hay; and in putting in the rye, he never did anything more than to tell me to put it in.

R. H. CARTWRIGHT,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is R. H. Cartwright. I live over near Big Timber, and Grey Cliff and Reed Point. I have lived there for a good many years, for twenty years. I am acquainted with Theodore Thompson. I have known him ever since 1915. I was slightly acquainted with him before he went to the war. Before he went into the army, I considered him a whole man, with reference to his physical condition. I saw him the next morning after he got out of the army. I was standing on the platform there at Grey Cliff and I saw him crossing the track over at the depot, and he was walking on sticks—had a couple of walking sticks. I made an assertion with reference to his condition that [148] he was a wreck; that it was too bad. I noticed him to be nervous and

(Testimony of R. H. Cartwright.)
run down. His nervousness showed itself in different ways, through excitement and every way, pretty near. I saw him frequently after he got back, and have seen him frequently up to the present time. I have visited him on his ranch since then. I have not seen him at work on the ranch to speak of, except some light chores. I have seen him ride horseback. I have heard the way these other men have described the extent to which he could ride a horse, and I have heard him describe it. That is true. I have ridden with him in the car. I have heard how these other men have described the way he drives a car. What they say with reference to that is also true. I have seen him carry a part of a bucket of slop over to his hog over across the lot, if there was nobody around; and feed his chickens. And one morning I came down to help him hay, and he had cut one round on the mower. That is some of the nearest farm work I have ever seen him do. He had cut this one round before I got there. It was a patch of four acres. After cutting this one round, he did not do any further work. There were boys coming to help him, and somebody took charge of the mower and went ahead. He went into the house. I have seen him milk gentle cows there. I was not there at one time when he got hurt milking a cow, but I was there the next morning early after he got hurt milking a cow. He was not milking the cow. This was a dry cow. I saw him, though, the next day after he had had some kind of an accident. **[149]**

(Testimony of R. H. Cartwright.)

Cross Examination

of R. H. Cartwright by Mr. Brown.

I have not seen him do some fencing. I have seen him do some of the chores around the place, and I have ridden with him after cattle. He rides all right after he gets on the horse. He will ride down the road in a walk. Considering the shape he is in, I would say he gets around on his leg in good shape at times. I did not see him driving a mowing machine. He was standing by the mowing machine and it had cut one round. That is my signature there, "R. H. Cartwright." I made a statement to a special agent of the Division of Investigation of the United States Department of Justice on February 6, 1935, and recall this man being around to see me. As to whether I recall that I said this over my signature: "During the past several years Theodore Thompson has done the light work around his place, such as repairing fences, and he runs a mower part of the time during haying season"; I do not think I put that in. It is over my signature, but I did not read it. He read it to me. It also states, "I have ridden with him when he was gathering up cattle during the branding season, and he rides fairly well after he once gets astride the horse, his main difficulty being in mounting." That is true. I do not remember making the statement there at all, as follows: "Other than the absence of his left leg, I have not known

(Testimony of R. H. Cartwright.)
him to be ill, and he walks and gets around with his false leg in fairly good shape." That is over my signature, but I did not read it before I signed it. It was read to me, but I do not remember all of this stuff that is in there. [150] That morning that I saw him standing beside the mowing machine I do not know who harnessed the team that morning. There were other men there; there was another mowing machine there.

Redirect Examination

of R. H. Cartwright by Mr. Molumby.

I have seen him riding a horse at other times than the one that I mentioned. I have ridden with him different times when we were after the cattle during the branding season and gathering for beef; just be there to show the cattle.

LEO OVERFELT,

recalled as a witness for the plaintiff, having been previously duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

I am the same Leo Overfelt who has testified before. There was gas in the area that I spoke of when I was over-seas in the Argonne. Gas was thrown on Mr. Thompson and myself in that area. It was mustard gas and cloud gas. I do not know

(Testimony of Leo Overfelt.)

what type of gas cloud gas is. It is thrown in a cloud, like smoke.

Q. Do you know the effect of that gas upon you and the other men in your company or battalion?

Mr. BROWN: We object to this as immaterial.

The COURT: Oh, it might be material, all right, if he knows of his own knowledge. [151]

Mr. BROWN: Exception, please.

A. I know what it does when you get a whiff of it. It kind of cuts your breath short. I got a little of it. I didn't get no great amount, because I had my gas mask handy all the time.

I saw others who had inhaled the gas.

Q. What was the effect on them?

Mr. BROWN: We object to that as incompetent, irrelevant and immaterial.

The COURT: Oh, if he knows.

Mr. BROWN: Exception.

A. Anyone that is gassed is short of wind and breathe deep, like they are struggling for breath.

Q. Make them sick?

A. Yes.

Mr. BROWN: I move to strike these answers, on the ground that he isn't qualified.

The COURT: Well, he described the different kinds of gas and said he inhaled it himself, and what the effect was on him, and he was

there under the effects of it and he told what they did. I think that is all right.

Mr. BROWN: Exception.

(Recess from 12:00 noon to 1:30 p. m. 6-24-36)

[152]

D. CLAIBORN,

a witness called in behalf of the plaintiff, being first duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

My name is D. Claiborn. I live at Big Timber. I am engaged in the profession of physician. I have practiced my profession as a physician since 1898. I am acquainted with Theodore Thompson, and have known him ever since his discharge from the army. Since his discharge from the United States army in the World War to the present date I have prescribed for a certain stomach trouble that he has been bothered with, irregularly, two or three times a year, perhaps continuously since his discharge.

I have been designated as Veterans Physician by the Department, and I contact nearly all of the boys in that locality who are invalid. I have not written many letters for the plaintiff that were sent to the Veterans Bureau, but I have written possibly two or three a year off and on.

(Testimony of D. Claiborn.)

Cross-Examination

of D. Claiborn by Mr. Brown.

Except one time when I was called to see Mr. Thompson at the ranch, all of the other occasions when I have prescribed for him have been for more or less trivial conditions, things where he was ambulatory, as we say, when he was up to the office, usually for constipation or a more or less minor ailment. [153]

Mr. MOLUMBY: Plaintiff rests.

Thereupon, without the presence of the jury, the defendant submitted its motion for a directed verdict, as follows:

Mr. BROWN: Comes now the defendant, at the close of the evidence of the plaintiff, and moves the Court to direct a verdict in favor of the defendant and against the plaintiff, on the following grounds and for the following reasons:

1. That the evidence is insufficient to sustain the material allegations of the plaintiff's complaint or to support a verdict in favor of the plaintiff and against the defendant; or to warrant the Court in entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent disability.

3. That it appears from the uncontradicted [154] evidence herein that the plaintiff was offered vocational training by the defendant and that he deliberately refused to accept such vocational training, and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation, in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has never at any time sought from the defendant, or from anyone else, any medical treatment or hospital treatment for his alleged stomach trouble or for the alleged injury to his right knee or his alleged nervousness or sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by reason of his failure to seek or receive from

the defendant such medical and hospital treatment, and his refusal to accept the [155] same that he cannot recover in this action for any claimed sickness or disability.

The COURT: Well, gentlemen, I suppose I could permit you to argue the motion; but I have in mind the evidence so clearly, and it is about the same as the last time the case was tried, and it is all a matter for the jury. And in order to rule with the defendant on this motion, I would have to totally disregard the testimony of the defendant himself and the circumstances surrounding his life. Of course, there are contradictions here in the way of documentary evidence, which vary quite seriously in some respects, which lessen, or rather perhaps I should say, affect the value of the testimony given by plaintiff; but that is a matter for the jury to determine, whether they will accept his version of the facts, or whether they will accept this documentary evidence and matters that have been presented here that rather detract from his evidence.

And on the other hand, you can't conclude the case from the evidence of the plaintiff altogether, because his neighbors have come in and testified to the conditions surrounding him and what he did and what he [156] did not do, and what he was able to do.

So far as vocational training is concerned, of course it is a question whether he did absolutely reject the offer of the Government to

fit him for some useful occupation. They were going to train him in agriculture, if they were going to train him at all. That is what he was taking there. And it develops that he had a pretty good ground, as far as I could determine. But while he was unable to do the work himself, the neighbors say and he says, that he had others do it for him; but he paid for the work out of his compensation. It seems to me that this is one of those cases to go to the jury, and if it was not credible evidence, I would be inclined to sustain a verdict for the defendant. But in the shape the decisions are now, it is anybody's game, when you get up to the higher Court, and they are able to construe these matters in such way that either side may prevail upon a motion such as this. But I feel that so far as this Court is concerned, there is sufficient evidence here to go to the jury, and they may perhaps properly say that there is a preponderance of evidence on the part of [157] the plaintiff. And that is for the jury to say. So, I will overrule the motion, and you may bring in the jury.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes, you may have an exception.

Thereupon the jury were returned into Court, and the following proceedings were had:

Mr. MOLUMBY: May the record show the admission of counsel on a matter that I over-

looked, and that is the citizenship and residence of the plaintiff in the State.

Mr. BROWN: Yes, we admit that. I think there is a denial of the allegation of the complaint, and I intended to call your attention to that.

The COURT: Very well, the record may show that.

Mr. BROWN: We offer in evidence as a part of the original file of the Government in this case the Defendant's Exhibit 21.

Mr. MOLUMBY: To which we object upon the ground and for the reason that there is no proper foundation laid; there is no application or anything to show that it was ever communicated to or received by the plaintiff or anyone. It is an unsigned typewritten piece of paper, by someone unknown. [158]

The COURT: What does it purport to be?

Mr. BROWN: It is a carbon copy of a letter, Your Honor.

Mr. MOLUMBY: On the further ground it is a self-serving declaration.

Mr. BROWN: I can call Mr. McGan, but it is a part of the record in this case, Your Honor.

The COURT: Well, I think perhaps counsel's objection would be good under the circumstances.

Mr. BROWN: As to no identification?

The COURT: Yes; that is a copy, doesn't show a signature at all.

F. J. McGAN,

called as a witness in behalf of the defendant, being first duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

My name is F. J. McGan and my residence is Butte, Montana. My occupation is Attorney for the Department of Justice. As such Attorney for the Department of Justice, I have in my official custody now certain original files and documents of the United States concerning this particular case and the compensation case of Theodore Thompson, the plaintiff in this action.

Mr. MOLUMBY: If the Court please, our objection don't go to the point that it is a part of the files. We will concede that [159] it is a part of the files.

The COURT: It is a copy of an original record. Now they will have to account for the loss of the original. Whom is it addressed to?

Mr. BROWN: It is addressed to the plaintiff in this action, if the Court please.

The COURT: Then you will concede that this is a copy of the original record of the Government in this action?

Mr. MOLUMBY: We will concede that it is in the file. That is as far as we can go. But that does not give us an opportunity to cross-examine the person who made it, and there is nothing to show that it was ever received by the defendant.

(Testimony of F. J. McGan.)

The COURT: That is true. You may have an exception to the ruling.

DEFENDANT'S OFFERED EXHIBIT NUMBER 21.

Jan. 16, 1920.

From: District Headquarters,
District #10, U. S. P. H. S.,
744 Lowry Bldg., St. Paul, Minn.

To: Theodore Thompson,
Greycliff, Montana.

Subject: Hospital care.

In Nov. Dr. T. V. Moore of Billings examined you and reported you as suffering from chronic intestinal infection. He advises that you should be under hospital care but stated you would not accept. It seems to me you [160] ought to be under treatment. We are ready to provide it at the expense of the Federal Government. Have you applied for compensation? If not, you should do so filling out form 526 and send same to this office with certified copy of your discharge papers.

H. M. BRACKEN,
Surgeon (Reserve)

THEODORE THOMPSON,

recalled as a witness for the defendant having been previously duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

In January, 1920, my post office was Grey Cliff, Montana. I do not remember if prior to January 16, 1920, I had been examined by Dr. T. V. Moore, of Billings, Montana, or not. I had been down to Billings for examination by several different doctors, but I do not remember the names of them. I do not remember whether I was examined by Dr. Moore or not; I could not say for sure. I cannot read the Defendant's Exhibit 21. I could not say whether in 1920 I received a letter from a H. M. Bracken, a Surgeon in the District Headquarters, in the employ of the United States Government at St. Paul, Minnesota, in which he said that I should be under hospital care, informing me that they were ready to provide it at the expense of the United States Government, and asking me if I had applied for compensation. I do not remember if I received such a letter. I won't say [161] that I did, and I won't say that I did not receive such a letter, because I do not remember. I do say that my address was Grey Cliff, Montana, at that time, and that I had been in Billings at that time to be examined by some Government doctor.

Mr. BROWN: We renew the offer, if the Court please (Defendant's Exhibit 21), as part

(Testimony of Theodore Thompson.)

of the original file of the Government, and under the presumption of the name and identity of the address of this plaintiff, it being a copy of a letter that was mailed to him. The original would not be in the possession of the United States Government.

Mr. MOLUMBY: To which we object on the grounds heretofore stated in our objection to its offer in the first instance.

The COURT: Well, I think I will have to sustain the objection.

Mr. BROWN: And may we have an exception, if the Court please?

The COURT: Yes.

Mr. MOLUMBY: And may the jury be instructed now that they disregard the letter?

The COURT: The jury will be instructed at the proper time and now to disregard anything that you heard in the reading of that letter, because I ruled it out of the case. [162]

Defendant's Exhibit 22 is shown me, dated June 21, 1920, addressed to Theodore Thompson, Grey Cliff, Montana, in which I am advised that under date of May 21st I was examined by Dr. P. L. Greene, of Livingston, Montana, and in which they enclosed transportation from Grey Cliff, Montana, to Minneapolis, Minnesota, with a hospital card admitting me to St. Barnabas Hospital. I cannot remember receiving such a letter as that. I can't

(Testimony of Theodore Thompson.)

remember that. I could not say if I received transportation; I do not remember.

Mr. BROWN: We offer in evidence, if the Court please, the Defendant's Exhibit 22.

Mr. MOLUMBY: To which we object on the same grounds stated in our objection to the offer of Defendant's Exhibit 21. We object on the same grounds, that it is a copy, from the same party, written exactly the same as the other.

The COURT: Let me see those letters? Do you mean to say that you do not remember any transportation being sent to you by the Government to go somewhere for treatment?

A. No, sir; I don't.

The COURT: Where are those letters? Is that a part of the A. G. O. record?

Mr. McGAN: It is a part of the compensation file, Your Honor. [163]

The COURT: I expect if it came up that way, in the Adjutant General's Office, such as have been received by the Courts—all sorts of communications can go in. But there are some separate and distinct objections to the admission of this form of a letter in evidence, a copy.

Mr. MOLUMBY: There is a distinction between the Adjutant General's Office, Your Honor, and this office. As to the Adjutant General's Office, we have a special statute making them admissible.

(Testimony of Theodore Thompson.)

The COURT: Yes, making them admissible. I shall have to sustain the objection to the introduction of that exhibit.

Mr. BROWN: May we have an exception, if the Court please?

DEFENDANT'S OFFERED EXHIBIT NUMBER 22.

June 21, 1920.

From: Supervisor, District #10,
Lowry Bldg., St. Paul, Minn.

To: Theodore Thompson,
Greycliff, Mont.

Subject: Hospital care.

Under date of May 21st you were examined by Dr. P. L. Greene of Livingston, Mont. who advises hospital care. Enclosed find transportation from Greycliff, Mont. to Minneapolis, Minn. with hospital card admitting you to [164] St. Barnabas Hospital where you will be under the care of Dr. J. F. Avery.

Transportation and meal requests should be used on trip only. Kindly return all unused transportation and meal requests to this office for cancellation.

By direction of the District Supervisor.

H. M. BRACKEN,
Surgeon (Reserve).

Copy Dr. Avery
Copy St. Barnabas Hos.

(Testimony of Theodore Thompson.)

I am shown a letter dated September 20, 1920, marked "Defendant's Exhibit 3, signed by C. A. Zuppann, District Vocational Officer, in which he informs me that he has in my file a statement to the effect that I will be prepared to continue my training this fall, informing me that the fall term at Bozeman, Montana, starts on September 28, and informing me that a letter authorizing me to travel is enclosed and asking me to fill out a blank showing the date that I will enter training and mail same in the enclosed envelope which requires no postage. I cannot remember if I received such a letter about September 20, 1920, requesting me to come back to Bozeman to take vocational training. I do not know whether I did or did not. I am shown another letter, dated October 20, 1920, addressed to Theodore Thompson, Grey Cliff, Montana, signed "C. A. Zuppann, by Leif Fredericks, Local Supervisor," in which they say that on the 20th of September the District Office in Minneapolis [165] sent me a letter, together with forms and transportation, requesting me to enter training in the College of Agriculture at Bozeman, Montana; also stating that they have not been returned to the office and that I have not yet given my reasons for not accepting the vocational training offered, and asking me whether or not I desire to avail myself of their offer of vocational training. I do not remember if I did or did not receive such a letter after October 20, 1920.

(Testimony of Theodore Thompson.)

Mr. BROWN: These are Defendant's Exhibits 3 and 4, if the Court please, and we now offer them in evidence.

Mr. MOLUMBY: To which we object on the same ground.

The COURT: It will have to be sustained.

Mr. BROWN: Your Honor, may we have an exception to the ruling of the Court, if you please.

DEFENDANT'S OFFERED EXHIBIT NUMBER 3.

September 20th, 1920.

Mr. Theodore Thompson,
Grey Cliff, Montana.

Dear sir:

We have in our file a statement to the effect that you would be prepared to continue your training this fall. The Fall term at the College of Agriculture, Bozeman, Montana, starts on September 28th. We are therefore enclosing you transportation for the purpose of reporting in time [166] to start your training when the school opens. Please report to Mr. Wm. F. Schoppe who will help you get started. Use this letter as an introduction.

A letter authorizing you to travel is enclosed.

Kindly fill out the enclosed dependency affidavit and return to this office as soon as possible. Also fill out the enclosed blank showing the date you enter

(Testimony of Theodore Thompson.)

training and mail same in the enclosed envelope which requires no postage.

Yours very truly,
O. W. JOHNSON,
Ass't to C. A. Zuppann,
District Vocational Officer.

DEFENDANT'S OFFERED EXHIBIT NUMBER 4.

Helena, Montana,
Oct. 20, 1920.

Mr. Theodore Thompson,
Grey Cliff, Montana.

Dear Mr. Thompson:

Under date of September 20th, the District Office in Minneapolis sent you a letter, together with several forms and transportation request, authorizing you to enter training at the College of Agriculture, Bozeman, Montana.

These have all been returned and forwarded to this office. As you gave no explanation as to why same were returned and the reason for not desiring to take the [167] training offered you, we are writing to ask that you kindly advise this office as soon as possible, using the enclosed self addressed envelope which requires no postage, for your reply, your reason for not accepting this training.

We assume however, that you care to avail yourself of this vocational training at some later date,

(Testimony of Theodore Thompson.)

if you are not at the present time able to do so, and we would request that you kindly advise this office a week or ten days in advance as to when you will be able to commence your training, and transportation will then be forwarded to you to your place of training.

Assuring you of our personal interest in your case and hoping we may hear from you in the very near future in regards to the above, we are,

Yours very truly,
C. A. ZUPPANN
District Vocational Officer
By: LEIF FREDERICKS
Local Supervisor.

Enclosure. [168]

D. CLAIBORN,

recalled as a witness for the defendant, having been previously duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

I have already stated that I am a physician. I am also President of the Citizens Bank and Trust Company at Big Timber. As such President of the Citizens Bank and Trust Company at Big Timber I have, at the defendant's request, produced the records showing the deposits and withdrawal by the plaintiff of money in our bank. Those records show the deposits and withdrawals from 1919 until last Saturday evening. The total of the deposits to date

(Testimony of D. Claiborn.)

was run on an adding machine for me. I did not run it. That total is $27,218.92. That is the total of money that he has deposited that has gone through the bank since 1919. This first entry in here is March 16, 1920, and that amount which I have testified to is the amount of deposits from that date.

Cross Examination

of D. Claiborn by Mr. Molumby.

The last entry in this record is of last Saturday. I do not know when the last deposit was made, but that is the complete records up until and including last Saturday.

Mr. MOLUMBY: Have you offered these in evidence?

Mr. BROWN: No. I just put that total in.

While these are not in evidence, I would like to take them back with me, because they are the only records we have. I would not object to leaving them here during the trial, [169] if there is a possibility that some items should be referred to.

Mr. MOLUMBY: It may be stipulated in the record that the records of the bank, concerning which Dr. Claiborn has testified, may be used by either party for such information as they desire, by reading them into the record or to the jury.

Mr. BROWN: Yes.

The COURT: Very well.

F. J. McGAN,

recalled as a witness for the defendant, having been previously duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

I now have in my custody, as an officer of the Government, all of the compensation file of Mr. Thompson, the plaintiff in this case. That file which I have discloses the amount of compensation and various amounts from time to time of compensation that have been paid by the defendant to Thompson. I have made an abstract of that information, which I have before me. I can tell when the Government first began to pay compensation to Mr. Thompson. They first commenced on the 14th of August, 1919. They paid him then $30.00 a month, and that continued until the 4th of January, 1920. A change was then made in the compensation, and beginning with the 5th of January, 1920, he was paid $80.00 a month. From the 5th of January, 1920, [170] he has been paid less than $80.00 a month. That eighty dollar payment lasted from the 5th of January, 1920, to the 30th of April, 1920. Commencing with the 1st of May, 1920, and ending with the 31st of December, 1925, he received $63.00 per month. From the first of January, 1926, to the 30th of April, 1933, he received $81.00 per month, and from April, 1933, to date he has received $106.00. I might explain there that he received an adjustment check two years ago for $900.00, covering back compensa-

(Testimony of F. J. McGan.)

tion on the award made of $81.00. He received that $900.00 check in a lump sum in addition to these other payments. I would have to look at my file to get the exact figure on that. It is nine hundred dollars one way or the other, more or less. I have the total amount of compensation paid him by the defendant. The total amount is $14,832.62. He is still receiving compensation at the rate of $106.00 a month.

Cross Examination

of F. J. McGan by Mr. Molumby.

That is just compensation, and does not include the training pay that he received while at Bozeman. I have that figure here. That amounted to $240.00. The figure that I gave is from the date of his discharge on. When he first got out of the army, according to his testimony, he did not draw the full $30.00 and subsequently he got an adjustment check; but I have taken that into consideration in this abstract. I have those exact figures if you would like me to give them to you; but I know that [171] to be a fact. The last date on which I figured compensation includes the payment up to this month of June.

M. E. HAWKINS,

called as a witness for the defendant, being first duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

My name is M. E. Hawkins. My residence is Billings, Montana.

Mr. MOLUMBY: We will agree, for the purpose of the record, that the court reporter is qualified to testify with reference to the matters you intend to examine him on.

I was present in Court as reporter and took the testimony of the plaintiff, Theodore Thompson, given at the time of the former trial of this case about the 3rd of April, 1935. On yesterday evening, at the request of Mr. Brown, I examined the shorthand notes that I made of the testimony given by the plaintiff at the former trial and refreshed my memory as to his testimony. Upon examination of my notes I am able to state that on the former trial this question was asked of Theodore Thompson, the plaintiff: "Have you taken any treatments for stomach trouble since you left Fort Des Moines?" His answer to that question was, "Yes, sir." He was then asked the following questions and answers:

"Q. When?

A. I have been taking that off and on about once a month.

Q. What is the treatment? [172]

A. Salts.

(Testimony of M. E. Hawkins.)

Q. You have taken no medical advice and had no medical attention, have you?

A. No, sir."

Also, this question was asked him on his cross-examination at that time: "Q. Now, with reference to your stomach condition, you told me yesterday that you had never received any treatment or consulted any doctor because of that since you left Fort Des Moines after your discharge August 13, 1919?" to which he answered, "No, sir."

This question was also asked him, "Q. You have not consulted anyone since then about stomach conditions, have you?" and his answer to that was, "No, sir."

This question was asked him, "Q. And you also stated, I believe yesterday, that the only treatment you have ever taken of any kind since you were discharged from the army on August 13, 1919, was, with reference to a stomach condition, that you took salts about once a month?" and his answer was, "Yes, sir.".

This transcript which counsel has held in his hand during my examination was made by me from my official notes.

No Cross Examination.

Mr. BROWN: If the Court please, we offer in evidence the affidavit of mailing of the complaint in this action on the Attorney [173]

(Testimony of M. E. Hawkins.)

General of the United States. It is a part of the original records of these files of this Court. I might say, Your Honor, that it is offered in support of our claim or affirmative defense that the action is barred by the Statute of Limitations, and not upon the question of disagreement.

Mr. MOLUMBY: To which the plaintiff objects upon the ground that it is incompetent, irrelevant and immaterial, not competent proof of the point for which it is offered. The statute of limitations in the state of Montana are the rules of procedure which govern in this case, being an action at law. This matter was threshed out by the Court, if my information is correct, and no Bill of Exceptions saved at the time, and I do not care to give up that advantage, if we have it. And we object further, Your Honor, on the ground that the statute of limitations is not pleaded in the answer.

The COURT: Well, he has pleaded it, all right. I think I will let that go in, if it is worth anything to him. I do not think it is under the decisions. It seems to me that I have ruled on this, that it is not barred; but he has made it an issue [174] and raised it in the answer, and you have a right to make a showing under it. I will overrule the objection and let it go in for whatever it is worth.

[Omitting Title of Court and Cause.]

AFFIDAVIT OF MAILING.

State of Montana,
County of Cascade—ss.

ALICE KAUFFMAN, being first duly sworn, deposes and says: That she is a citizen of the United States, over twenty-one years of age; that on the 23 day of July, 1931, she served a copy of the complaint in the above entitled action on the Attorney General of the United States of America by depositing in the United States mail, in the Post Office at Great Falls, Montana, a copy of the complaint in the above entitled action, enclosed in an envelope directed to the Attorney General of the United States of America, Washington, D. C., on which the postage was prepaid, and which said letter was registered, the receipt therefor being hereto attached; that there is a regular and daily course of mail between the point of deposit and Washington, D. C. wherein said Attorney General of the United States resides and has his office.

ALICE KAUFFMAN

Subscribed and sworn to before me this 23 day of July, 1931. [175]

[Notarial Seal] P. G. GREENAN

Notary Public for the State of Montana. Residing at Great Falls, Montana. My commission expires June 14, 1933.

(Attached to said instrument is Receipt for Registered Article No. 1084, dated Great Falls, Montana, July 23, 1931).

Mr. BROWN: May it be stipulated that the first appearance of the United States in this case was by general demurrer, filed September 23, 1931?

Mr. MOLUMBY: We agree to it. And ask that an exception be noted as to the previous ruling, Your Honor.

The COURT: Yes, an exception may be noted.

Mr. BROWN: The defense rests, Your Honor.

D. CLAIBORN,

recalled as a witness for the plaintiff in rebuttal, having been previously duly sworn, upon

Direct Examination

by Mr. Molumby, testified as follows:

During those years covered by the totals which I gave of the deposits of Theodore Thompson made in my bank, the bank or myself as President of the bank have made loans to him right along. We have made any loans he ever asked for. He has only asked for nominal amounts. Some years he would borrow a hundred dollars or two or three hundred. He probably borrowed two hundred or two hundred fifty dollars a year, somewhere along there. As to whether I recall that at the last trial I stated that he probably [176] borrowed one hundred fifty dollars twice a year; it is possibly that amount. It

(Testimony of D. Claiborn.)
is nominal amounts, but it is somewhere in that neighborhood. Such borrowings as he made from the bank from time to time he would always deposit in this bank account and then check it out.

Cross Examination
of D. Claiborn by Mr. Brown.

I do not know if he is indebted to the bank on those borrowings now. If he is, it is a very small amount.

THEODORE THOMPSON,
the plaintiff, recalled as a witness in his own behalf in rebuttal, having been previously duly sworn, upon

Direct Examination
by Mr. Molumby, testified as follows:

I am the same Theodore Thompson who has been sworn and testified before here. The $2500.00 that I testified that I borrowed from Carl Bue was deposited with the Citizens Bank and Trust Company at Big Timber. And the $1800.00 that I mentioned as having been borrowed from Carl Bue was also deposited with that bank. Those deposits were made between 1919 and the present date. The money that I borrowed from Nepstad was also deposited during those dates in that particular bank. I could not say if all of the compensation that I received from the Government was really deposited in that bank. I

(Testimony of Theodore Thompson.)

might have cashed a check and bought something with it, but the biggest part of it was [177] deposited in the bank. Other than being used to buy some small item, I deposited the balance in the bank each time.

During the period from 1919 to the present date I have not on frequent occasions or on different occasions loaned money myself to other people in small amounts. The item on these ledger sheets of the bank, which is shown to me, from which Dr. Claiborn procured the total, dated and deposited on May 19, 1923, in the sum of $2500.00, is the $2500.00 which I borrowed from Carl Bue, or could have been that item. It was about that time that I borrowed it from Carl. It was after that that I borrowed the $1800.00. I remember other sums that I deposited there, other than my compensation and this money that I borrowed from Bue. I remember other moneys that I got. When my father died, he left me with an estate of about $600.00. I deposited that $600.00 in this bank also. I have also deposited half of my bonus when I drew that two or three or four years ago, the amount of which was seven hundred fifty something. I do not think of any other sums which I deposited in that bank account in that period. At different times I have sold some stock, and have deposited the biggest part of that money in the bank. Last Fall I shipped a few cattle and it amounted to about $350.00 and I put that amount in the bank. At that time it appears that

(Testimony of Theodore Thompson.)

I deposited the sum of $419.00, which would be that amount. That could have included something besides the sale of the cattle. If that deposit was made in August last year, that would be the time that I made the deposit. [178]

No Cross Examination.

Mr. MOLUMBY: No further rebuttal, Your Honor.

Mr. BROWN: If the Court please, at the close of all the evidence, we desire to renew the motion for directed verdict in favor of the defendant and against the plaintiff on the following grounds and for the following reasons:

1. That the evidence is insufficient to sustain the material allegations of the plaintiff's complaint or to support a verdict in favor of the plaintiff and against the defendant, or to warrant the Court in entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent disability.

3. That it appears from the uncontradicted evidence herein that the plaintiff was offered

vocational training by the defendant, and that he deliberately refused to [179] accept such vocational training and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in, or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has never at any time sought from the defendant or from anyone else any medical treatment or hospital treatment for his alleged stomach trouble or for the alleged injury to his right knee or his alleged nervousness or the sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by reason of his failure to seek or receive from the defendant such medical and hospital treatment, and his refusal to accept the same, that he cannot recover in this action for any claimed sickness or disability. [180]

6. And on the further ground that it appears that the action is barred by the provisions of title 445 of section 38 of the U. S. Code.

The COURT: The motion is denied.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes.

Thereupon, the cause was argued to the jury by counsel for the respective parties, and the Court charged the jury as follows:

The COURT: Gentlemen of the Jury: You have heard the evidence in this case and the arguments of counsel, and as in other jury cases, it becomes the duty of the Court to advise you as to the principles of law that you are to accept and that will govern your deliberations in reaching your verdict, in the hope that they will make it easier and enable you the more readily to find a verdict in the case.

As in all of these cases, you gentlemen are the sole judges of the facts and of the credibility of witnesses, and of the weight to be given testimony; and the Court is the judge of the rules of law, as before stated.

Now, this is an action of a civil nature, and the issues are made up by the filing of a complaint and an answer. There was no reply filed, I believe.

Mr. BROWN: No; no reply was filed, Your Honor.

The COURT: And really, the issues are very simple and very plain. Of course the complaint and answer consist of several pages of typewritten matter; but after all, [181] there is really but one issue for you to determine here in this case, and

that is whether the defendant became totally and permanently disabled, as the Court will define such disability to you, at a time when his insurance was in force. That is really the main and the principal, and we might say, the only issue in this case.

Now, in all cases of this character the affirmative of the issue must be proven; and when the evidence is contradictory, the affirmative of the issue, or the burden, rests upon the plaintiff to prove his case by a preponderance of the evidence.

By a preponderance is meant the greater weight of the evidence, and that preponderance is not determined entirely on account of the number of witnesses that testify to any given fact or state of facts, although that may be taken into account too; but it is determined more by the character and nature of the testimony, and from the witness himself testifying upon the witness stand. You note whether he is candid and frank in his statements, what opportunities he may have had for observing the things about which he testifies; you note his intelligence or lack of intelligence; prejudice, if any, or lack of prejudice; relationships, if any exist; and all those things you take into account in determining where the preponderance of the evidence is to be found.

Sometimes in cases the jury find that the evidence is evenly divided. But of course, if a jury determines that the evidence is evenly divided, then the case [182] has not been established by the plaintiff by a preponderance of the evidence, and the jury would have to find for the defendant.

Now, as I said, you are the sole judges of the facts, the credibility of witnesses, and the weight to be given testimony. You see the different witnesses come upon the witness stand. You note their manner and demeanor while testifying. You note whether they are frank or whether they are evasive, whether they are forgetful of important things—the things that you may deem important in the testimony and as bearing upon the issues in the case. You note what relationships exist, if any. You note whether the witness appears to have any interest in the outcome of the case. All of those things you take into account in determining what you will do with the testimony of that particular witness.

There is a presumption that the witness is speaking the truth; but this presumption may be repelled by his manner of testifying, by contradictory evidence, or by evidence affecting his credibility. And as to that, of course, you are the sole judges.

Now, there are three modes of impeaching a witness. Of course, the first is by showing a different statement made on some other occasion or by contradicting his present testimony upon the witness stand, or by evidence of bad reputation. If you believe that any witness has wilfully testified falsely to a material matter in the cause, you have a right to distrust his testimony throughout, [183] and to disregard it altogether, unless you find corroboration of some parts of it, either in the testimony of other witnesses or in the circumstances which you have observed during the course of the trial.

Now, of course, no juror has the right arbitrarily to disregard the testimony of any witness not impeached in some of the modes that the Court has suggested to you, providing that testimony is reasonable and consistent with the other facts and circumstances in the case.

Now, sometimes a jury are troubled in trying to determine what they will do because of the large number of witnesses testifying on one side, as opposed to a small number on the other. Well, as before stated, in respect to preponderance of evidence, that is not alone determined by the number of witnesses. You are advised that the direct evidence of one credible witness is sufficient to establish a given fact or state of facts in this case; and the Court means, of course, by a credible witness one in whom the jury have confidence—a witness you believe, who inspires your trust and confidence because of his testimony.

There has been introduced in this case what we term in law expert or opinion evidence. Now, irrespective of the testimony of expert witnesses, as we call them, who come in here and testify because of their special knowledge of certain facts, professional men such as doctors and surveyors and engineers, etc., whatever they may say to you, whatever they may give to you in the way of testimony, you will remember that the ultimate weight of that testimony is [184] with the jury the same as that of any other witness who may testify in the case. And you gentlemen are not required to surrender

your own judgment, if you consider it based upon credible evidence, to that of any witness testifying in this cause as an expert.

Of course, where an expert testifies to facts within his personal knowledge, why, his testimony is like that of any other witness. But whatever weight you will give to the testimony of expert witnesses you will give by reason of a consideration of all of the testimony in the case, taken in connection with the expert testimony.

Gentlemen, the Court will remind you that any colloquy or dispute that may have occurred during the trial of this case, either between counsel or between the Court and counsel, which is not based upon the evidence in the case, you will wholly disregard.

You will remember that only the evidence submitted here in this court room and on this trial, either through the testimony of the witnesses or the exhibits and documents that have been introduced here in this case, are to be considered by you as evidence in this case. And you are not to consider anything that you may have heard or read on the outside, but be guided solely and entirely by the evidence here.

You will also remember that any evidence which the Court may have excluded, or which was stricken from the record, you will also disregard.

Now then, there are certain special instructions [185] here bearing particularly upon the issues here involved in this case which the Court

will give, in addition to the general instructions that the Court gives in all of these civil actions, and many of them in criminal actions as well.

You are instructed, Gentlemen, that this is an action brought under the War Risk Insurance Act, and is in the nature of an action on a contract of insurance. For the purpose of determination of this action, it must be taken as conceded that the plaintiff did enter into a contract with the defendant to insure him in the sum of ten thousand dollars against death or total permanent disability suffered or contracted while said policy of insurance was in effect, which policy was payable upon maturity in the sum of $57.50 per month. And if you believe that Theodore Thompson became totally and permanently disabled on or before the 13th day of August, 1919, then his insurance matured upon the date he became totally and permanently disabled as defined in these instructions, and would therefore be due and payable to this plaintiff from the date upon which he became so totally and permanently disabled at the rate of $57.50 per month for each and every month elapsing since the date he became totally and permanently disabled.

Have you figured out that amount in your forms of verdict?

Mr. MOLUMBY: The form of verdict reads "in the amount of the installments accruing from and after" the date, [186] Your Honor.

The COURT: Well, that would be sufficient to guide us.

You are instructed that the statute upon which this action is based reads as follows—that portion which is material, of section number 300 of the War Risk Insurance Act: "In order to give to every commissioned officer and enlisted man, and to every member of the army nurse corps female, and of the navy corps female, when employed in the active service under the War Department or Navy Department, protection for themselves and their dependents, the United States, upon application to the Bureau, and without medical examination, shall grant United States Government life insurance, convertible insurance, against the death or total permanent disability of such person in any multiple of $500.00, and not less than $1,000.00 or more than $10,000.00, upon the payment of the premiums as hereinafter provided. Such insurance must be applied for within 120 days after enlistment or after entrance into or employment in the active service and before discharge or resignation."

Justice Holmes, of the United States Supreme Court, has given voice to an expression in an opinion rendered in reference to the War Risk Insurance Act which may throw some light on this case, which is as follows:

"The certificate of insurance provided in terms that it should be 'subject in all respects to the provision of such act (that is to say, the act of 1917), of any amendments thereto, and of all regulations thereunder, now in [187] force or hereafter adopted, all of which, together with the application for this

insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.' These words must be taken to embrace changes in the law no less than changes in the regulations. The form was established by the Director with the approval of the Secretary of the Treasury and on the authority of article 1, §1, and article 4, §402, of the Act, which, we have no doubt, authorized it. The language is very broad and does not need precise discussion when the nature of the plan is remembered. The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them, if not paternal, was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the government's hands to that extent no one else could complain. The only relations of contract were between the Government and him."

You are instructed that the contract of insurance sued on herein insured the plaintiff against total permanent disability, and that therefore the occasion, source or cause of the plaintiff's disability, if you find that he has one, is immaterial. The plaintiff's injuries, [188] exposure and illness before the lapse of his policy (if you find from a pre-

ponderance of the evidence in this case that he sustained injuries, suffered exposure or had illness) and his condition in subsequent years have significance, if any, only to the extent that they tend to show whether he was in fact totally or permanently disabled during the life of the policy or prior to the first day of October, 1919, the date on which the said insurance policy lapsed by reason of the plaintiff's failure to pay the premiums necessary to continue the same in force.

You are instructed that the policy of insurance herein sued on did not insure the plaintiff for inability to follow the occupation of a farmer, or for inability to follow any specific occupation whatsoever; but that it insured him only in the event that during its life he became totally and permanently disabled from following with reasonable regularity any substantially gainful occupation.

You are instructed that the burden is on the plaintiff in this case to prove to your satisfaction by a preponderance of the evidence that he was, on the 1st day of October, 1919, the day upon which his policy of insurance lapsed, totally and permanently disabled from following any substantially gainful occupation or from following with reasonable regularity any substantial gainful occupation; and that his condition was such on that date that it was reasonable to presume that he would continue for the rest of his life to be so totally and permanently disabled. And unless you so find, your verdict must be for the de- [189] fendant.

You are instructed that as a matter of law the loss of a leg in itself does not render one totally and permanently disabled within the meaning of the insurance contract sued on herein.

You are instructed that plaintiff's conduct since the first day of October, 1919, reflects in his own opinion as to whether he was totally and permanently disabled at the time of the lapse of the policy of insurance on that date, and his failure earlier to commence his action on such policy shows that for thirteen years he did not believe he was totally and permanently disabled when he allowed his policy to lapse.

You are further instructed that in the absence of clear and satisfactory evidence on behalf of the plaintiff, explaining, excusing or justifying such long delay before commencing this action, the plaintiff's long delay in commencing such action is to be taken as strong evidence that he was not totally and permanently disabled before the policy lapsed.

You are instructed that you are to consider the term "total disability" as any impairment of mind or body which renders it impossible for the insured to follow continuously a substantially gainful occupation without seriously impairing his health; and that total disability is to be considered by you as permanent when it is of such a nature as to render it reasonably certain that it will continue throughout the lifetime of the insured. [190]

You are instructed that total disability does not mean helplessness or complete disability. But it in-

cludes more than that which is partial. Permanent disability means that which is continuing, as opposed to that which is temporary. Separate and distinct periods of temporary disability do not constitute that which is permanent. The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim to permanent total disability. He may have worked when really unable, at the risk of injuring his health or life. If the plaintiff is able to follow a gainful occupation only spasmodically, with frequent interruptions due to his disability, or if his periods of work, though more or less regular and continuous, were done at the risk of his injuring his health or life, he was then totally and permanently disabled within the meaning of his contract and the War Risk Insurance Act.

But on the other hand, if he was able to follow a gainful occupation regularly, continuously, and without frequent interruptions because of his disability, then he would not be totally and permanently disabled.

You are instructed that if you find from the evidence that Theodore Thompson became totally and permanently disabled as defined in *this* instructions, on or prior to the date to which his insurance was paid. it is immaterial whether the disease, injuries or disabilities causing his total permanent disability were contracted prior to the date of his enlistment in the army or during the time he was in [191] the army, or whether it was contracted subsequent

to his discharge from the army. If he became totally and permanently disabled as those terms are in these instructions defined, at a time on or prior to August 13, 1919, his insurance had matured and become payable.

You are instructed that in determining whether the said Theodore Thompson was totally disabled, you may take into consideration his previous occupation, learning and experience in so far as it is shown in evidence.

You are instructed that if you should find from the evidence that Theodore Thompson became totally and permanently disabled as defined in these instructions from on or prior to August 13, 1919, and has remained so totally and permanently disabled thereafter, then his insurance did not lapse on October 1, 1919, nor on any other date, for nonpayment of premiums.

You are instructed that a thing once proven to exist is presumed to continue as long as is usual with things of that nature.

You are instructed, for the purpose of this action, that the plaintiff must be taken to have been in sound physical condition when he enlisted in the defendant's army.

The Court will again call your attention to the fact that when you retire and examine the pleadings, you will run across the five thousand dollar policy which was set up in the answer, which you are to disregard. That is not under consideration in this case at all, but only the [192] policy of

insurance taken out when he enlisted in the army, which these instructions relate to; the only issue being permanent and total disability.

Now Gentlemen, of course you will consider all of the evidence very carefully and analyze it to the very best of your ability, guided by the evidence, of course, and arguments of counsel and the instructions of the Court. You will find, of course, in the analysis of the testimony that in the beginning this defendant lost his left leg. The member was so severely wounded in battle that it had to be amputated. There will be no doubt in your minds in that respect, of course. And you will say from the evidence, following those injuries and during his hospitalization, that he was probably totally disabled for a period of a year, or in that neighborhood at any rate.

Now then, it is for you to say from all of the evidence in the case, including the evidence of the injury and this period of total disability, and all of the subsequent proof, whether or not you believe he has been totally disabled ever since, and that he is permanently disabled. Those are facts for you to determine.

You will note, of course, that the disability and illness and injuries and all depend very largely—the nature and character and extent of them, depend very largely upon the testimony of the plaintiff himself and what he says about himself; what he said about being shell shocked. Although, another comrade said that there was gas in that area

all that time, bearing corroboration. And of course [193] you will find corroboration of his testimony in the testimony of the physicians and in the testimony of his friends and neighbors down where he lives. And you will take that into account and say how far that sustains him in his own testimony. And you will also take into account the documentary evidence that has been admitted here, showing perhaps a contrary statement or inconsistent statements at other periods of time during the last thirteen years, or since his injury was received, or since his insurance policy lapsed. And you are to take those things into account, too.

Now, it is the duty of the jury to reconcile contradictions and inconsistencies, in so far as they are able to do so. Where you come to the point where you feel that it is almost impossible to reconcile them, then the jury have got to review the evidence and they must rely upon the testimony and the evidence in the case that they deem worthy of belief. You must pick it out here and there, and then rely upon your judgment, under the rules the Court has given you, reconciling those conflicts wherever you can do so; but giving the evidence, after your final deliberation over it, such weight as you finally think it ought properly to receive.

It takes twelve of your number to agree on any verdict. You should select a foreman, and he will sign your verdict when you agree. You may now retire to deliberate.

Are there any exceptions?

Mr. BROWN: The defendant objects and excepts [194] to the refusal of the Court to give Government's proposed instruction Number 1.

The COURT: Very well. You may retire, Gentlemen. Forms of verdicts will be given you, Gentlemen, and the pleadings in the case, and you may examine the exhibits that have been introduced in evidence. If you find any use for them, they will be available.

Defendant's proposed Instruction Number 1 refused by the Court is as follows:

You are directed to return your verdict in favor of the defendant and against the plaintiff. [195]

Thereafter, and on the 25th day of June, 1936, the jury returned into Court with its verdict; which, omitting title of Court and Cause, is as follows:

VERDICT.

We, the Jury, in the above entitled cause, find for the plaintiff, and against the defendant, and assess his damages in the amount of the installments of War Risk Insurance accruing from and after the 13th day of August, 1919.

JAMES NOYES,
Foreman.

Whereupon, the following proceedings were had:

Mr. McGAN: Let the record show, if Your Honor please, that by agreement of counsel the defendant is granted ninety days in addition to the time allowed by law to prepare, serve and file its bill of exceptions herein?

The COURT: Very well.

Mr. McGAN: And would Your Honor please make an order extending the term in which the cause is tried to and including the day on which defendant's bill of exceptions is finally settled?

The COURT: Very well. [196]

AND NOW, Within the time allowed by law and the extension of time granted by the Court, defendant prepares and files herein its proposed bill of exceptions, embodying an order of the Judge granting the defendant ninety days within which to prepare, serve and file its bill of exceptions herein, stipulation of counsel relating thereto and an order of the Judge continuing the term at which the above-entitled cause was tried to and including the day on which defendant's bill of exceptions is finally settled; embodying all the rulings of the Court and proceedings had on the trial of said cause, the exhibits offered and received, and prays that the

same be allowed, signed, settled and filed as defendant's bill of exceptions.

Dated this 10th day of September, 1936.

JOHN B. TANSIL,
United States Attorney for
the District of Montana,
By R. LEWIS BROWN
Assistant U. S. Attorney.
FRANCIS J. McGAN
Attorney, Department of
Justice.
Attorneys for Defendant.

Service of the above and foregoing proposed Bill of Exceptions is admitted and a copy thereof received this 10th day of Sept., A. D. 1936, after lodging.

MOLUMBY, BUSHA & GREENAN,
By LOY J. MOLUMBY
Attorneys for Plaintiff. [197]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff in the above entitled action, through his attorneys, Molumby, Busha & Greenan, and the defendant through its attorneys, that the above and foregoing bill of exceptions is true, full and correct; that it contains all the evidence introduced, proceedings had and exceptions taken in the trial of said action, and that it may be signed, settled and allowed by the

Judge who tried the case as a full, true and correct bill of exceptions herein.

MOLUMBY, BUSHA & GREENAN,
By .....
Attorneys for Plaintiff.
JOHN B. TANSIL,
United States Attorney for the District of Montana,
By R. LEWIS BROWN
Assistant U. S. Attorney.
FRANCIS J. McGAN
Attorney, Department of Justice.
Attorneys for Defendant. [198]

CERTIFICATE OF JUDGE.

The undersigned Judge, who tried the above entitled action, HEREBY CERTIFIES that the above and foregoing is a full, true and correct bill of exceptions in said action; and that it contains all the evidence and exhibits offered and introduced, proceedings had and exceptions taken on the trial of said action. AND IT IS ORDERED, and this does ORDER, that the above and foregoing be approved, allowed and settled as a full, true and correct bill of exceptions herein within the judgment term or proper extension thereof.

Sept. 25, 1936.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed Sept. 25, 1936. [199]

Thereafter on September 25, 1936, Assignment of Errors was duly filed herein, which is in the words and figures following, towit: [200]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

COMES NOW the United States of America, the defendant in the above entitled action, by its attorneys, and in connection with its petition for appeal says that in the record and proceedings had in the above entitled action, manifest error has intervened to the prejudice of the defendant, upon which it will rely in the prosecution of its appeal herein, to-wit:

I.

The Court erred in denying defendant's motion, made at the conclusion of plaintiff's case, to which action of the Court defendant then and there duly excepted, as follows:

Mr. MOLUMBY: Plaintiff rests.

Thereupon, without the presence of the jury, the defendant submitted its motion for a directed verdict, as follows:

> Mr. BROWN: Comes now the defendant, at the close of the evidence of the plaintiff, and moves the Court to direct a verdict in favor of the defendant and against the plaintiff, on the following grounds and for the following reasons:
>
> 1. That the evidence is insufficient to sustain the material allegations of the [201] plaintiff's

complaint or to support a verdict in favor of the plaintiff and against the defendant; or to warrant the Court in entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent disability.

3. That it appears from the uncontradicted evidence herein that the plaintiff was offered vocational training by the defendant and that he deliberately refused to accept such vocational training, and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation, in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has never at any time sought from the defendant, or from anyone else, any medical [202] treatment or hospital treatment for his alleged stomach

trouble or for the alleged injury to his right knee or his alleged nervousness or sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by reason of his failure to seek or receive from the defendant such medical and hospital treatment, and his refusal to accept the same that he cannot recover in this action for any claimed sickness or disability.

The COURT: * * * I will overrule the motion and you may bring in the jury.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes, you may have an exception.

II.

The Court erred in sustaining plaintiff's objection to defendant's offer of Exhibit No. 21, and refusing to receive the same in evidence, to which action of the court defendant then and there duly excepted, as follows:

Mr. BROWN: We offer in evidence as a part of the original file of the Government in this case the Defendant's Exhibit 21.

Mr. MOLUMBY: To which we object upon the ground and for the reason that there is no proper foundation laid; there is no application or anything to show that it was ever communicated to or received by the plaintiff or anyone. It is an unsigned typewritten piece of paper, by someone unknown. [203]

The COURT: What does it purport to be?

Mr. BROWN: It is a carbon copy of a letter, Your Honor.

Mr. MOLUMBY: On the further ground it is a self-serving declaration.

Mr. BROWN: I can call Mr. McGan, but it is a part of the record in this case, Your Honor.

The COURT: Well, I think perhaps counsel's objection would be good under the circumstances.

Mr. BROWN: As to no identification?

The COURT: Yes; that is a copy, doesn't show a signature at all.

F. J. McGAN,

called as a witness in behalf of the defendant, being first duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

My name is F. J. McGan and my residence is Butte, Montana. My occupation is Attorney for the Department of Justice. As such Attorney for the Department of Justice, I have in my official custody now certain original files and documents of the United States concerning this particular case and the compensation case of Theodore Thompson, the plaintiff in this action.

Mr. MOLUMBY: If the Court please, our objection don't go to the point that it is a part of the files. We will concede that it is a part of the files.

(Testimony of F. J. McGan.)

The COURT: It is a copy of an original record. Now they will have to account for the loss of the original. Whom is it addressed to? [204]

Mr. BROWN: It is addressed to the plaintiff in this action, if the Court please.

The COURT: Then you will concede that this is a copy of the original record of the Government in this action?

Mr. MOLUMBY: We will concede that it is in the file. That is as far as we can go. But that does not give us an opportunity to cross-examine the person who made it, and there is nothing to show that it was ever received by the defendant.

The COURT: That is true. You may have an exception to the ruling.

THEODORE THOMPSON,

recalled as a witness for the defendant, having been previously duly sworn, upon

Direct Examination

by Mr. Brown, testified as follows:

In January, 1920, my post office was Grey Cliff, Montana. I do not remember if prior to January 16, 1920, I had been examined by Dr. T. V. Moore, of Billings, Montana, or not. I had been down to Billings for examination by several different doctors, but I do not remember the names of them. I do not remember whether I was examined by Dr.

(Testimony of Theodore Thompson.)

Moore or not; I could not say for sure. I cannot read the Defendant's Exhibit 21. I could not say whether in 1920 I received a letter from a H. M. Bracken, a Surgeon in the District Headquarters, in the employ of the United States Government at St. Paul, Minnesota, in which he said that I should be under hospital care, informing me that they were ready to provide it at the expense of the United States Government, and asking me if I had applied for compensation. I do not remember if I received such a letter. I won't say [205] that I did, and I won't say that I did not receive such a letter, because I do not remember. I do say that my address was Grey Cliff, Montana, at that time, and that I had been in Billings at that time to be examined by some Government doctor.

Mr. BROWN: We renew the offer, if the Court please (Defendant's Exhibit 21), as part of the original file of the Government and under the presumption of the name and identity of the address of this plaintiff, it being a copy of a letter that was mailed to him. The original would not be in the possession of the United States Government.

Mr. MOLUMBY: To which we object on the grounds heretofore stated in our objection to its offer in the first instance.

The COURT: Well, I think I will have to sustain the objection.

(Testimony of Theodore Thompson.)

Mr. BROWN: And may we have an exception, if the Court please?

The COURT: Yes.

DEFENDANT'S OFFERED EXHIBIT NUMBER 21.

is in words and figures as follows:

Jan. 16, 1920.

From: District Headquarters,
District #10, U. S. P. H. S.,
744 Lowry Bldg., St. Paul, Minn.

To: Theodore Thompson,
Greycliff, Montana.

Subject: Hospital care.

In Nov. Dr. T. V. Moore of Billings examined you and reported you as suffering from chronic intestinal [206] infection. He advises that you should be under hospital care but stated you would not accept. It seems to me you ought to be under treatment. We are ready to provide it at the expense of the Federal Government. Have you applied for compensation? If not, you should do so filling out form 526 and send same to this office with certified copy of your discharge papers.

H. M. BRACKEN,
Surgeon (Reserve)

III.

The Court erred in sustaining plaintiff's objection to the introduction in evidence of defendant's

Exhibit No. 22, to which action of the Court defendant then and there duly excepted as follows:

Mr. BROWN: We offer in evidence, if the Court please, the Defendant's Exhibit 22.

Mr. MOLUMBY: To which we object on the same grounds stated in our objection to the offer of Defendant's Exhibit 21. We object on the same grounds, that it is a copy, from the same party, written exactly the same as the other.

The COURT: Let me see those letters? Do you mean to say that you do not remember any transportation being sent to you by the Government to go somewhere for treatment?

A. No sir; I don't.

The COURT: Where were those letters? Is that a part of the A. G. O. record?

Mr. McGAN: It is a part of the compensation file, Your Honor.

The COURT: I expect if it came up that way, in the Adjutant General's Office, such as have been received by the Courts—all sorts of communications can go in. But there are some separate and distinct objections to the admission of this form of a letter in evidence, a copy. [207]

Mr. MOLUMBY: There is a distinction betweent the Adjutant General's Office, Your Honor, and this office. As to the Adjutant General's Office, we have a special statute making them admissible.

The COURT: Yes, making them admissible. I shall have to sustain the objection to the introduction of that exhibit.

Mr. BROWN: May we have an exception, if the Court please?

DEFENDANT'S OFFERED EXHIBIT NUMBER 22.

is in words and figures as follows:

June 21, 1920.

From: Supervisor, District #10,
Lowry Bldg., St. Paul, Minn.

To: Theodore Thompson,
Greycliff, Mont.

Subject: Hospital care.

Under date of May 21st you were examined by Dr. P. L. Greene of Livingston, Mont. who advises hospital care. Enclosed find transportation from Greycliff, Mont. to Minneapolis, Minn. with hospital card admitting you to St. Barnabas Hospital where you will be under the care of Dr. J. F. Avery.

Transportation and meal requests should be used on trip only. Kindly return all unused transportation and meal requests to this office for cancellation.

By direction of the District Supervisor.

H. M. BRACKEN,
Surgeon (Reserve).

Copy Dr. Avery

Copy St. Barnabas Hos. [208]

IV.

The Court erred in sustaining plaintiff's objection to the introduction in evidence of defendant's Exhibits No. 3 and 4, to which action of the Court defendant then and there duly excepted, as follows:

Mr. BROWN: These are Defendant's Exhibits 3 and 4, if the Court please, and we now offer them in evidence.

Mr. MOLUMBY: To which we object on the same ground.

The COURT: It will have to be sustained.

Mr. BROWN: Your Honor, may we have an exception to the ruling of the Court, if you please?

DEFENDANT'S OFFERED EXHIBIT NUMBER 3.

is in words and figures as follows:

September 20th, 1920.

Mr. Theodore Thompson,
Grey Cliff, Montana.

Dear Sir:

We have in our file a statement to the effect that you would be prepared to continue your training this fall. The Fall term at the College of Agriculture, Bozeman, Montana, starts on September 28th. We are therefore enclosing you transportation for the purpose of reporting in time to start your training when the school opens. Please report to

Mr. Wm. F. Schoppe who will help you get started. Use this letter as an introduction.

A letter authorizing you to travel is enclosed. [209]

Kindly fill out the enclosed dependency affidavit and return to this office as soon as possible. Also fill out the enclosed blank showing the date you enter training and mail same in the enclosed envelope which requires no postage.

Yours very truly,
O. W. JOHNSON,
Ass't to C. A. Zuppann,
District Vocational Officer.

DEFENDANT'S OFFERED EXHIBIT NUMBER 4

is in words and figures as follows:

Helena, Montana,
Oct. 20, 1920.

Mr. Theodore Thompson,
Grey Cliff, Montana.

Dear Mr. Thompson:

Under date of September 20th, the District Office in Minneapolis sent you a letter, together with several forms and transportation request, authorizing you to enter training at the College of Agriculture, Bozeman, Montana.

These have all been returned and forwarded to this office. As you gave no explanation as to why

same were returned and the reason for not desiring to take the training offered you, we are writing to ask that you kindly advise this office as soon as possible, using the enclosed self addressed envelope which requires no postage, for your reply, your reason for not accepting this training.

We assume however, that you care to avail yourself of this vocational training at some later date, [210] if you are not at the present time able to do so, and we would request that you kindly advise this office a week or ten days in advance as to when you will be able to commence your training, and transportation will then be forwarded to you to your place of training.

Assuring you of our personal interest in your case and hoping we may hear from you in the very near future in regards to the above, we are,

Yours very truly,

C. A. ZUPPANN

District Vocational Officer

By: LEIF FREDERICKS

Local Supervisor

Enclosure.

V.

The Court erred in denying defendant's motion for a directed verdict, made at the conclusion of all the evidence, to which action of the Court defendant then and there duly excepted, as follows:

Mr. MOLUMBY: No further rebuttal, Your Honor.

Mr. BROWN: If the Court please, at the close of all the evidence, we desire to renew

the motion for directed verdict in favor of the defendant and against the plaintiff on the following grounds and for the following reasons:

1. That the evidence is insufficient to sustain the material allegations of the plaintiff's complaint or to support a verdict in favor of the plaintiff and against the defendant, or to warrant the Court in entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

[211]

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent diability.

3. That it appears from the uncontradicted evidence herein that the plaintiff was offered vocational training by the defendant, and that he deliberately refused to accept such vocational training and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in, or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has

never at any time sought from the defendant or from anyone else any medical treatment or hospital treatment for his alleged stomach trouble or for the alleged injury to his right knee or his alleged nervousness or the sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by [212] reason of his failure to seek or receive from the defendant such medical and hospital treatment, and his refusal to accept the same, that he cannot recover in this action for any claimed sickness or disability.

6. And on the further ground that it appears that the action is barred by the provisions of Sec. 445 of Title 38 of the U. S. Code.

The COURT: The motion is denied.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes.

VI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

You are directed to return your verdict in favor of the defendant and against the plaintiff,

the defendant's exception being as follows:

The COURT: Are there any exceptions, Mr. Brown?

Mr. BROWN: The defendant objects and excepts to the refusal of the Court to give the Government's proposed instruction No. 1.

The COURT: Very well. You may retire, gentlemen.

VII.

The evidence is insufficient to justify the verdict.

VIII.

There is nothing in the evidence in this case tending to show that at the time the insurance upon which the plaintiff bases his claim lapsed he was permanently and totally disabled. [213]

IX.

The verdict is against law.

X.

The Court erred in entering judgment in favor of the plaintiff and against the defendant.

XI.

The Court was without jurisdiction to enter the judgment that it entered in this action.

WHEREFORE, for such errors, defendant prays that the judgment of the District Court of the United States for the District of Montana, Billings Division, dated July 18, 1936, be set aside and vacated and that this case be remanded for a new trial.

JOHN B. TANSIL
Attorney of the United States, in and for the District of Montana.

R. LEWIS BROWN
Assistant Attorney of the United States, in and for the District of Montana.

FRANCIS J. McGAN
Attorney, Department of Justice.

Service of the above and foregoing assignment of errors acknowledged and copy thereof received at Great Falls, Montana this 25th day of September, 1936.

MOLUMBY, BUSHA & GREENAN
Great Falls, Montana,
By A. KAUFFMAN
(Attorneys for Plaintiff and Appellee)

[Endorsed]: Filed Sept. 25, 1936. [214]

Thereafter, on September 25, 1936, Petition for Appeal was duly filed herein, which is in the words and figures following, to-wit: [215]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above named defendant, feeling itself aggrieved by the rulings of the Court during the trial of the above entitled action and the order and final judgment entered therein on the 18th day of July, 1936, does hereby appeal from the said rulings of the Court and said order and judgment, and each and every part thereof to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors presented herewith, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the

record, proceedings and papers upon which said judgment and order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided.

JOHN B. TANSIL,
United States Attorney for the District of Montana,
Butte, Montana,
R. LEWIS BROWN,
Assistant United States Attorney, District of Montana,
Butte, Montana,
FRANCIS J. McGAN,
Attorney, Department of Justice,
Butte, Montana,
(Attorneys for Defendant and Appellant.) [216]

Service of the above and foregoing Petition for Appeal acknowledged and copy thereof received at Great Falls, Montana, this 25 day of Sept., 1936.

MOLUMBY, BUSHA & GREENAN,
Great Falls, Montana,
By A. KAUFFMAN,
(Attorneys for Plaintiff and Appellee.)

[Endorsed]: Filed Sept. 25, 1936. [217]

Thereafter, on September 25, 1936, Order Allowing Appeal was duly filed herein, which is in the words and figures following, to-wit: [218]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendant in the above entitled action having filed therein its petition that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made, rendered and entered of record in the above entitled Court and action on July 18, 1936, and that a citation be issued as provided by law and a transcript of the records, proceedings and papers upon which said order and judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by law and the rules of said Court in such cases made and provided and being fully advised of the law and the facts and it appearing therefrom to be a proper case therefor, Now, Therefore:

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and judgment heretofore entered and filed herein on the 18th day of July, 1936, as aforesaid, be and the same is hereby allowed; and,

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations, said order and judgment, and all proceedings in the above entitled action be forthwith trans-

mitted by the Clerk of the above entitled Court to said United States Circuit Court of Appeals for the Ninth Circuit. [219]

Done in open court at Great Falls, Montana, this 25 day of Sept., 1936.

CHARLES N. PRAY,
Judge of the District Court
of the United States,
District of Montana.

Service of the above and foregoing Order acknowledged and copy thereof received at Great Falls, Montana, this 25 day of Sept., 1936.

MOLUMBY, BUSHA &
GREENAN,
Great Falls, Montana.
By A. KAUFFMAN,
(Attorneys for Plaintiff and
Appellee.)

[Endorsed]: Filed Sept. 25, 1936. [220]

Thereafter, on September 25, 1936, Citation on Appeal was duly filed herein, the original Citation being hereto annexed and being in the words and figures following, to-wit: [221]

[Title of Court and Cause.]

CITATION.

YOU ARE HEREBY CITED AND ADMONISHED to be and appear before the United States

Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal in the above entitled action of record in the office of the Clerk of the District Court of the United States for the District of Montana, Billings Division, wherein the United States of America is appellant and Theodore Thompson is appellee, to show cause, if any there be, why the judgment rendered and entered against the defendant and appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties hereto in that behalf.

WITNESS, the Honorable Charles N. Pray, Judge of the District Court of the United States for the District of Montana, this 25th day of September, 1936.

CHARLES N. PRAY,
Judge of the District Court
of the United States,
District of Montana.

ATTEST my hand and the seal of the Court at Great Falls, Montana, this 25 day of Sept., 1936.

[Seal] C. R. GARLOW,
Clerk of the above entitled
Court.
By C. G. KEGEL,
Deputy Clerk of said Court.

[222]

Service of the above and foregoing Citation admitted and copy thereof received at Great Falls, Montana, this 25 day of Sept., 1936.

MOLUMBY, BUSHA &
GREENAN,
Great Falls, Montana,
By A. KAUFFMAN,
(Attorneys for Plaintiff and Appellee.)

[Endorsed]: Filed Sept. 25, 1936. [223]

Thereafter, on September 25, 1936, Praecipe for Transcript of Record was duly filed herein, which is in the words and figures following, to-wit: [225]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the Above Entitled Court:

Sir:

Please prepare and certify record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause and include therein the following papers and documents:

1. Complaint;
2. Summons and Marshal's return thereon;
3. Answer;
4. Verdict;
5. Judgment;
6. Clerk's minute entries;

7. Bill of Exceptions;
8. Assignment of Errors;
9. Petition for Appeal;
10. Order Allowing Appeal;
11. Stipulation and Order for Diminution of Record;
12. Citation;
13. Clerk's Certificate;
14. Defendant's requested Instruction No. 1 not given by the Court; and,
15. This Praecipe. [226]

Dated this 25 day of September, 1936.

JOHN B. TANSIL,
United States Attorney for the District of Montana,
Butte, Montana,
R. LEWIS BROWN,
Assistant United States Attorney, District of Montana,
Butte, Montana,
FRANCIS J. McGAN,
Attorney, Department of Justice,
Butte, Montana,
(Attorneys for Defendant and Appellant.)

[Endorsed]: Filed Sept. 25, 1936. [227]

Thereafter, on September 28, 1936, Stipulation and Order for Diminution of Record was duly filed herein, which is in the words and figures following, to-wit: [228]

[Title of Court and Cause.]

STIPULATION FOR DIMINUTION OF RECORD.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action that in the printing of the transcript of the record therein the title of the Court and the title of the cause on the pleadings and documents need not be printed in full, but may be entitled thus,—"Title of Court and Cause," and that the endorsement on each of such papers and documents, except the filing endorsement, may also be omitted.

Dated Sept. 25, 1936.

JOHN B. TANSIL,
United States Attorney for the District of Montana,
Butte, Montana,
R. LEWIS BROWN,
Assistant United States Attorney, District of Montana,
Butte, Montana,
FRANCIS J. McGAN,
Attorney, Department of Justice,
Butte, Montana,
(Attorneys for Defendant and Appellant.)

MOLUMBY, BUSHA &
GREENAN,
Great Falls, Montana,
By LOY J. MOLUMBY,
(Attorneys for Plaintiff and
Appellee.)

It is so ordered:

CHARLES N. PRAY,
Judge of the United States
District Court,
District of Montana.

[Endorsed]: Filed Sept. 28, 1936. [229]

Thereafter, on October 16, 1936, Order extending time to file transcript of record in Circuit Court of Appeals was duly entered herein, which is in the words and figures following, to-wit: [230]

[Title of Court and Cause.]

ORDER.

Upon application of the appellant and for good cause appearing IT IS ORDERED that the time for docketing the transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause be and the same is hereby extended to and including January 25, 1937.

Dated this 16th day of October, 1936.

CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Entered October 16, 1936. [231]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 232 pages, numbered consecutively from 1 to 232 inclusive, is a full, true and correct transcript of the record and proceedings in case Number 669, Theodore Thompson vs. United States, required to be incorporated therein by praecipe filed, except the Summons, none having been issued in said cause, and except the Defendant's Requested Instruction No. 1, which appears at page 195 herein, in the Bill of Exceptions; I further certify that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of $37.50 and have been made a charge against the United States.

Witness my hand and the seal of said Court at Great Falls, Montana, this 6th day of November, A. D. 1936.

[Seal] C. R. GARLOW,
Clerk.
By H. H. WALKER,
Deputy. [232]

[Endorsed]: No. 8373. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Theodore Thompson, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed November 9, 1936.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8373

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

Brief for the Appellant

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.

JOHN B. TANSIL,
United States Attorney.

WILBUR C. PICKETT,
Special Assistant to the Attorney General.

R. LEWIS BROWN,
Assistant United States Attorney.

KEITH L. SEEGMILLER,
Attorney, Department of Justice.

FRANCIS J. McGAN,
Attorney, Department of Justice.

FILED

JAN 22 1937

PAUL P. O'BRIEN,

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CITATIONS

Cases:

No. 8373

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE

This suit was brought to recover total permanent disability benefits under a contract of war risk term insurance which afforded insurance protection from February 1, 1918, to October 1, 1919. The case came on for jury trial on June 23, 1936, with issue joined on plaintiff's allegation that he became totally permanently disabled during the life of the policy. At the close of all the testimony defendant moved for a directed verdict on the

ground that there was no substantial evidence to support a verdict for plaintiff (R. 181). The motion was denied and an exception reserved (R. 183). Thereafter the jury returned a verdict in favor of plaintiff (R. 15), in accordance with which judgment was entered on July 18, 1936, awarding benefits from August 13, 1919 (R. 16). Defendant's petition for appeal (R. 216) and assignment of errors (R. 201) were duly filed and appeal allowed (R. 218).

QUESTION PRESENTED.

Whether there was any substantial evidence that plaintiff became totally permanently disabled during the period of protection under his insurance contract.

ASSIGNMENT OF ERRORS.

The foregoing question is raised by assignment of errors Nos. V, VI, VII and VIII (R. 212-215), as follows:

V.

> The Court erred in denying defendant's motion for a directed verdict, made at the conclusion of all the evidence, to which action of the Court defendant then and there duly excepted, as follows:
>
> Mr. MOLUMBY: No further rebuttal, Your Honor.
>
> Mr. BROWN: If the Court please, at the close of all the evidence, we desire to renew the motion for directed verdict in favor of the defendant and against the plaintiff on the following grounds and for the following reasons:
>
> 1. That the evidence is insufficient to sustain the material allegations of the plaintiff's complaint or to support a verdict in favor of the plaintiff and against the defendant, or to warrant the Court in

entering a judgment in favor of the plaintiff and against the defendant, if the jury's verdict were in favor of the plaintiff.

2. That it appears from the uncontradicted evidence herein that the only disabilities suffered by the plaintiff at the time of his discharge from the army was the loss of his left leg, which, as a matter of law, does not constitute a total and permanent disability.

3. That it appears from the uncontradicted evidence herein that the plaintiff was offered vocational training by the defendant, and that he deliberately refused to accept such vocational training and that he refused to in any manner improve himself so as to enable him to earn a living and to follow a substantially gainful occupation in spite of his handicap.

4. That it does not appear from the evidence in the case that the plaintiff made any endeavor to fit himself for any work that a one-legged man can ordinarily engage in, or to engage in any work which ordinarily a one-legged man could do.

5. That it appears from the uncontradicted evidence in this case that the plaintiff has never at any time sought from the defendant or from anyone else any medical treatment or hospital treatment for his alleged stomach trouble or for the alleged injury to his right knee or his alleged nervousness or the sickness which he claims constitutes a disability in addition to the loss of his leg; and that he has refused to accept any such treatment; and that by reason of his failure to seek or receive from the defendant such medical and hospital treatment, and his refusal to accept the same, that he cannot recover in this action for any claimed sickness or disability.

6. And on the further ground that it appears that the action is barred by the provisions of Sec. 445 of Title 38 of the U. S. Code.

The COURT: The motion is denied.

Mr. BROWN: May we have an exception, Your Honor?

The COURT: Yes.

VI.

The Court erred in refusing to give to the jury defendant's requested instruction No. 1, as follows:

You are directed to return your verdict in favor of the defendant and against the plaintiff, the defendant's exception being as follows:

The COURT: Are there any exceptions, Mr. Brown?

Mr. BBOWN: The defendant objects and excepts to the refusal of the Court to give the Government's proposed instruction No. 1.

The COURT: Very well. You may retire, gentlemen.

VII.

The evidence is insufficient to justify the verdict.

VIII.

There is nothing in the evidence in this case tending to show that at the time the insurance upon which the plaintiff bases his claim lapsed he was permanently and totally disabled.

POINTS AND AUTHORITIES

I.

There is no substantial evidence that during the life of his policy plaintiff suffered any impairment of a totally permanently disabling nature.

United States v. *Mayfield*, 64 F. (2d) 214 (C. C. A. 10th);

United States v. *Adcock*, 69 F. (2d) 959 (C. C. A. 6th);

United States v. *Harris*, 66 F. (2d) 71 (C. C. A. 4th);

Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

II.

There is evidence that he has pursued a substantially gainful occupation;

United States v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);
United States v. *Steadman,* supra;
Harris v. *United States,* 70 F. (2d) 889 (C. C. A. 4th);

and

III.

An absence of evidence that he could not have pursued any of many other occupations possibly more suited to his condition.

Miller v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734;
United States v. *Mayfield, supra;*
Hanagan v. *United States,* 57 F. (2d) 860 (C. C. A. 7th).

ARGUMENT

THERE IS NO SUBSTANTIAL EVIDENCE THAT PLAINTIFF BECAME TOTALLY PERMANENTLY DISABLED DURING THE LIFE OF HIS POLICY.

Review of the record will reveal that although plaintiff has lost his left leg, he has used effectively a well-fitted artificial limb; that other claimed disabilities

were at most of trivial nature, and that the incurability thereof during the life of the policy was not shown. It will further appear that for more than ten years since the alleged date of total permanent disability plaintiff has pursued the occupation of farming with no attempt to do work more suited to his condition, and that in fact he has made a success of his farming enterprise.

SUMMARY OF THE EVIDENCE

At the time of his induction into service plaintiff was twenty-four years of age and had worked as a farm laborer and sheep herder for wages ranging from $50.00 to $80.00 per month during the five preceding years. He was a native of Norway, with a seventh or eighth-grade education, had come to this country at the age of nineteen, and had acquirerd only limited ability to use the English language (R. 19-20).

On October 31, 1918, while engaged in active battle, he received a severe injury to the left leg (R. 27), which resulted after several operations (R. 29) in the amputation of that limb about five inches above the knee. An artificial limb was fitted and at the time of his discharge on August 13, 1919, he was able to walk with the assistance of canes or a crutch (R. 32). The medical testimony is in accord that the amputation appeared to have been skilfully performed; that the stump was well healed, and the artificial limb well-fitted and in good condition (R. 122, 126).

Plaintiff testified that while drilling at Camp Lewis he stepped in a hole, twisting his right knee, as a result

of which he was confined to the barracks for several days (R. 20-21), and that at all times since "It affects me when I am walking. If I don't watch how I fix my foot or place my foot, it kind of hurts and grinds back in my knee. * * * there is just a kind of catch in there" (R. 21), and "It hurts by spells, once in a while" (R. 50). However, for more than six months immediately following this claimed injury he performed regular military duty, including drilling and marching, until the date of the injury to his left leg (R. 51). He has never requested or received any treatment for the right knee. An examination made the day before trial revealed that the right knee was normal in appearance and freely movable, with a localized tenderness over the inner side. Though there was no "redness or anything of that sort," the examining physician noted a feeling of something slipping when the knee was moved (R. 128). Plaintiff testified that this joint is "getting worse as time goes on" (R. 21).

He also testified that due to impure drinking water and improper food while at the battle front in France, he developed an abdominal disorder characterized by cramps, diarrhea, nausea, and vomiting, and that on one occasion he inhaled a small amount of poison gas which affected his stomach (R. 25). He further testified that these abdominal symptoms had recurred periodically "one a month or two or three months" to the present time, because of which he had been required to observe a restricted diet and resort to such treatment as salts,

mineral oil and pills (R. 77). The only diagnosis of this condition, made on July 2, 1924, was possibly appendicitis and colitis, which, it was testified, often follows dysentery (R. 118). Dr. Claiborn, plaintiff's witness, testified that since plaintiff's return from service he prescribed for his stomach trouble two or three times each year and that except upon one occasion it has always been for "more or less trivial conditions, * * * constipation or a more or less minor ailment" (R. 156). It does not appear that subsequent to his military service he has had any other medical treatment for any purpose.

While there is lay testimony that plaintiff was pale, thin and nervous at the time he returned from the Army (R. 56, 131, 141, 144, 150), and a notation on his discharge papers described his physical condition as "Poor" (R. 44), there is no testimony as to any subsequent nervousness, and when examined on July 2, 1924, he was found to be of "good general appearance, nutrition and musculature good. * * * no particular drawing of the face or signs of any great pain" (R. 120-121).

Except for the loss of the left leg, he claimed no disability in his application for compensation executed on August 18, 1919 (R. 62), nor on an inquiry regarding his insurance on December 18, 1919, though on this occasion he did mention certain "minor injuries about the face" (R. 67). On September 10, 1919, in an application for vocational training, he represented that except for the loss of the left leg he was "Otherwise in good health" (R. 85), and in applying for reinstatement of

his insurance on July 6, 1921, he certified "I am now in good health" (R. 72). In July, 1924, and October, 1926, he declined requests to report for treatment because "I can not possibly leave my ranch at this time since I can not hire any one to take care of it for me" (R. 80), and "I am trying to make final proof on my homestead, and it will be coming up November 29th, and * * * I would prefer to wait till after that time" (R. 82).

He testified that upon his discharge from the Army he returned to Montana and lived for several months with various neighbors doing no work (R. 32), after which he was in vocational training in agriculture for three months (R. 35) until he quit of his own volition because, he testified, "I was unable to take that type of instruction" and "I just got disgusted" (R. 35). He attributed his difficulty in vocational training to his limited knowledge of the English language (R. 33), but it appears that preliminary courses in reading, writing and arithmetic were available to him (R. 90, 95, 114), and that he then stated that he could read newspapers and write letters in English (R. 85). When he ceased vocational training he signed a statement that he was voluntarily resuming compensation status in preference to his training status (R. 89), and though he testified that he did not understand the meaning of some of the words in that statement (R. 114), he knew that his training pay of $100.00 per month would cease, in lieu of which he would receive compensation (R. 87), which

had been only $30.00 per month prior to vocational training (R. 172).

Thereafter he lived with his cousin for a month and with one Myrstol for about a year, doing little work (R. 35-36). He then moved to a homestead upon which he had filed prior to service (R. 37), and during the following six months "proved up" on this place and secured title. During the year and a half that succeeded he lived upon the farm of one Terland. He testified that he did very little work during this time (R. 37). About 1924 he bought a ranch of 325 acres for $2,500, ultimately relinquishing his homestead in lieu of $2,400 of this purchase price. He has lived upon this ranch since 1924, since which date he has purchased more land (R. 38), so that at the time of trial he owned 749 acres (R. 103). There is testimony that the manual labor required on his ranch has been done by hired help (R. 39-40, 135, 145-146). However, he has upon occasion driven a derrick team (R. 135); milked gentle cows; driven an automobile; done light chores (R. 151), and ridden horses (R. 145). In addition thereto he has always managed and directed the farm activities (R. 103). One witness for plaintiff testified as follows:

> I have cultivated that land myself, and it has been under the supervision and direction of Thompson. He has told me how to do it. From what I have observed, it appears to me that he knows how to operate that property and give directions for its proper management. He knows how the soil should be tilled to raise a crop. He can direct the men what to do in order to farm it. He can do that, ac-

> cording to my observation and he has done it for years. He has managed and supervised that property. (R. 149).

There is opinion testimony that plaintiff's land does not afford adequate opportunities for earning a livelihood (R. 148), but he has built a house and barn thereon; fenced most of the 749 acres (R. 104); built an irrigation ditch approximately three miles long; acquired ordinary farm equipment, including mowers, a rake, plow and harrow, in addition to teams and harnesses (R. 108); a few sheep and chickens (R. 104); a Pontiac touring car and a Chevrolet truck (R. 105), and commencing with two head of cattle when he purchased his farm in 1924, he had more than forty head at the time of trial, though he has sold some from year to year (R. 102-103). It was testified by a witness for the plaintiff:

> As to the kind of buildings, etc., his place appears good. They are well kept up. His crops appear to be well cultivated, and the entire ranch appears as though it is properly operated. I would say that the crop produced each year on the land that is cultivated is a good a crop as is produced on like land around in the community by the other farmers. (R. 149).

Since 1920 he has maintained a bank account (R. 171). The deposits therein indicate an income of some $10,000, in addition to amounts received as compensation (R. 173) and soldier's bonus, and through inheritance and unpaid loans (R. 180). This is based upon the assumption that all of his compensation was deposited in the bank, though there is no evidence to that

effect. Neither does it appear that all other income was deposited in this account.

The officials of his bank considered his credit rating good (R. 139), it being testified by the President of that institution that "We have made any loans he ever asked for" (R. 178).

DISCUSSION

There is nothing in the record opposed to the testimony of Dr. Claiborn, plaintiff's witness, who had observed his abdominal condition periodically from 1919 to the date of trial, that it was "more or less trivial" (R. 156). In fact, this testimony is corroborated by plaintiff's failure to mention this ailment upon the several occasions when he was required to list all of his disabilities. In his own mind it seems to have been subordinated to certain "minor injuries about the face," which he reported on December 18, 1919 (R. 67). Subsequent to the claimed injury to his right knee he did regular Army service for about six months without reporting this condition or receiving any treatment therefor, and it seems clear that the disabling effects were at most only slight at any time during the period of insurance protection. An examination as late as 1934 revealed no serious impairment of this joint, even though, as plaintiff testified, "It is getting worse as time goes on."

Furthermore, it cannot be ascertained from the record that either of the foregoing conditions would not have yielded to treatment and in the absence of such evi-

dence there is no basis for an inference that even their slightly disabling effects were permanent.

Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

As to plaintiff's principal disability, it has been judicially noticed that there are many occupations open to men who have suffered the loss of one leg.

United States v. *Mayfield,* 64 F. (2d) 214 (C. C. A. 10th);

See also

United States v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th);
United States v. *Harris,* 66 F. (2d) 71 (C. C. A. 4th);

This would seem to be particularly applicable to the present case, wherein it was shown that the stump was well healed and the artificial limb well fitted. Moreover, the plaintiff has demonstrated his ability to follow a gainful occupation despite his admitted disability. For more than ten years he has superintended and managed a ranching enterprise with financial success at least comparable to that achieved prior to service, although precluded by his injury from the performance of manual labor.

Cf.

United States v. *Green,* 69 F. (2d) 921 (C. C. A. 8th);

United States v. *Steadman,* supra;
Harris v. *United States,* 70 F. (2d) 889 (C. C. A. 4th);

Furthermore, recovery under a contract of war risk term insurance must be predicated upon proof that the insured could not have followed any substantially gainful occupation.

Miller v. *United States,* 294 U. S. 435, rehearing denied, 294 U. S. 734;
United States v. *Mayfield, supra;*
Hanagan v. *United States,* 57 F. (2d) 860 (C. C. A. 7th).

There is evidence indicating that plaintiff had native capacity to follow other occupations than farm supervision if such adjustment had been required by his disabilities. In fact, vocational training with pay was provided by the Government and voluntrily discontinued. There is no explanation of why he did not attempt to adapt himself to other occupations except that his farming activities were producing satisfactory results.

Cf.

United States v. *Jones,* 73 F. (2d) 376 (C. C. A. 5th).

CONCLUSION

It is respectfully submitted that the trial court erred as herein assigned and that the judgment should be reversed.

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January, 1937.

No. 8373

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

THEODORE THOMPSON,

Appellee.

On Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLEE

MOLUMBY, BUSHA & GREENAN,
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BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Facts stated by Appellant in their Statement of the Case are correct.

QUESTION PRESENTED

The Assignment of Errors specified in the brief of Appellant raises but a single question, namely; Is there any substantial evidence to justify the verdict of the jury? (See Brief of Appellant, p. 2, 3 & 4).

POINTS AND AUTHORITIES

I.

In passing on question involved, this Court must take the evidence in the most favorable light to the Appellee, must presume that all conflict in the evidence was

resolved in favor of the Appellee, and must resolve all conflict in the evidence in favor of the Appellee, and this court is not warranted in substituting its judgment on the evidence for that of the jury and the trial Court.

Henry W. Cross Co. vs Burns
81 F. (2nd) 856,

E. K. Wood Lbr Co., vs. Anderson
81 F. (2nd) 161

Phillips Petroleum Co. vs. Manning
81 F. (2nd) 849

Chase National Bank vs. Fidelity Deposit Co.
79 F. (2nd) 84

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81 F. (2nd) 593

Booth vs. Gilbert
79 F. (2nd) 790

U. S. vs. Hossman
84 F. (2nd) 808

U. S. vs. Fancher
84 F. (2nd) 306

II.

The education, experience, mental and physical capabilities of the Appellee and the circumstances under which the Appellee's wounds and disabilities were received together with the subsequent history of Appellee and his disabilities must all be considered in determining whether or not Appellee was totally and permanently disabled during the life of his policy and remained so at all subsequent times.

Lumbra vs. U. S. 290 US 551
54 S. ct. 272 78 L. ed. 492

III.

Evidence that Appellee lost left leg five inches above the knee and suffered an injury to his right knee, permanent in character, causing slipping of an internal semi-lunar cartilage, suffered from measles and mumps, necessitating hospitalization for six weeks and confinement to quarters for a period of two or more weeks leaving him in a weakened and extremely nervous condition, and that while in this condition, he drank poisoned water, which caused dysentery and vomiting from which he never recovered and caused an infection of the bladder diagnosed as chronic colitis, from which he never recovered and that thereafter he was severely gassed and thereafter lost his leg and that from the time that he suffered his attack of measles and mumps, has continuously been nervous to an extent that he is unable to concentrate or be around other people, amply sustains the findings of a jury that he was totally and permanently disabled.

Lumbra vs. U. S. 290 US 551,
54 S. ct. 272 78 L. ed. 492

U. S. vs. Hossman
84 F. (2nd) 808

U. S. vs. Fancher
84 F. (2nd) 306

U. S. vs. Christenson
82 F. (2nd) 311

U. S. vs. Domanque
79 F. (2nd) 647

U. S. vs. Rucker
80 F. (2nd) 369

U. S. vs. Huddleston
81 F. (2nd) 593

and it is not error to submit such a case to a jury.

U. S. vs. Hannan
85 F. (2nd) 341

U. S. vs. Vallandza
81 F. (2nd) 615

U. S. vs. Trollinger
81 F. (2nd) 167

Corrigan vs. U. S.
82 F. (2nd) 106

U. S. vs. Edson
79 F. (2nd) 866

IV.

The effect of such evidence cannot be controverted by a contention that the lack of work record was voluntary, by reason of compensation having been paid by the government in an amount sufficient to maintain Appellee and in excess of what he earned prior to his entry into the army.

U. S. vs. Fancher
84 F. (2nd) 306

ARGUMENT

In reviewing the question of whether or not there is sufficient evidence to justify the verdict, this Court must take the evidence in the most favorable light to the Appellee, and must presume that all conflict in the evidence was resolved in favor of the Appellee, and this Court is not warranted in substituting its judgment on the evidence for that of the jury and the trial court.

Henry W. Cross Co. vs. Burns,
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U. S. vs. Huddleston,
81 F. (2nd) 593,

Booth vs. Gilbert,
79 F. (2nd) 790.

Counsel for the Appellant in their brief, contrary to the above rule, has stated only a portion of the evidence and this in the most unfavorable light to the Appellee, and has failed to state that evidence favorable to the Appellee, and wherever there is a conflict in the evidence, has selected that portion of the evidence which was most unfavorable to the Appellee. Instead of presenting the full picture in their argument, counsel have taken only isolated bits of the evidence and quoted the same as if that were the only evidence in the case.

EVIDENCE AMPLY SUSTAINS THE VERDICT

A thorough study of the Transcript will show that the verdict of the jury was amply sustained by the evidence. Appellant contends that the evidence shows that he is merely a one-legged man and that his other injuries and disabilities are of a trivial nature, and not shown to be incurable and that the evidence shows that he has farmed with success, all of which statements are directly contrary to the evidence.

The evidence discloses many injuries and disabilities acquired while in the Service and the sequence of these

injuries are important for the reason that at the time his major handicap was acquired, he was in a weakened physical condition which increased the disabling effect of the major handicap, and in turn the major handicap increased the effect of the other disabilities.

In determining the effect of injuries and disabilities, one must take into consideration not only the actual injury and its nature, but one must take into consideration also the surrounding conditions under which the injury was received and in addition thereto, the nature, experience and education of the man injured. As the Supreme Court of the United States has said:

> "That which sometimes results in a total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves without serious loss of productive power against injury or disease sufficient totally to disable others". (*Lumbra vs. U. S. 290 US 551 54 S. Ct. 272, 78 L. ed. 492*).

The evidence discloses that the Appellee was born and raised in Norway and came to this country in 1912 unable to talk English; that after his arrival in this country, he associated with Norwegians and picked up very little knowledge of the English language, got so he could understand the simple words of English but still was unable to talk English to any extent when he was inducted into the Service; that he has never acquired sufficient knowledge of the English language to be able to read and write; that he can read simple words in the English language but cannot understand very much of what he reads; that he had gone to school in Norway but had no schooling whatever in this country (R. 19

and 20; R. 46 to 48). Even at the trial, the Appellee did not know the meaning of such simple words as "status", "voluntary", "discontinue", "preference" (R. 113 to 114); but more important still, the lower court and the jury saw the Appellee, saw him for days of questioning and cross-questioning and knew what his mental capabilities were and knew from that observation just how ignorant he was, and knew also just how disabling this type of injury to this type of man would be, and saw also just what effect this type of injury had upon the man's nervous and mental make-up—something that cannot be transcribed into a record and had that advantage which this Court can never obtain.

APPELLEE SUFFERS FROM FIVE SERVICE INCURRED DISABILITIES

While in the service the Appellee incurred and suffered four separate and distinct disabilities, aside from and in addition to having his left leg blown off, each of which have continuously since they were incurred seriously disabled and greatly contributed to the handicap caused by the loss of the leg.

1.—INJURY TO RIGHT KNEE:

Shortly after reporting for service and while at Camp Lewis, the Appellee injured his right knee while on a night maneuver. He fell into a hole and twisted his right knee. It swelled up, hurt and caused him to limp. The Captain relieved him of all duty (R. 20-21) for a week or ten days (R. 50). The injury was described by a doctor as being an internal semi-lunar cartilage slip

with crepitus (R. 128-129) and the effect of which was described by the Appellee as continuous pain when used effecting him when he walks, has to place his foot just right otherwise it hurts and grinds back in his knee, and to overcome the situation, he has to take ahold of it and hold it in place, there is kind of a catch in there (R. 21). This injury might have been slight in itself had nothing further occurred to the Appellee, but thereafter he had his other leg blown off. While he had both of his legs, he could favor the injured right knee, but when his left leg was blown off, it was necessary for him to put all his weight on his right leg and accentuated the disability occurring from the injury to his right knee. The Appellee states that the injury to the right knee gets worse all the time, because now he is a one-legged man and has to put his weight on it (R. 21). The doctor likewise said that the loss of his other leg increased the disability arising from the injury to his right knee (R. 129). That this injury is and has been of a permanent nature is shown not only by the fact that it has continued with him all these years but that the doctors in the army told him that there was nothing that they could do for it (R. 55-56).

2.—MUMPS, MEASLES AND NERVOUSNESS:

A few weeks after the injury to his right knee, the Appellee contracted measles and mumps, was in the hospital for a month or six weeks and was "marked quarters" for an additional two weeks, remaining in quarters without doing duty because of his illness, and from this illness he lost a great deal of weight, was left weak and

extremely nervous (R. 21-22). Whether or not the attack of the measles and mumps was the inception of his nervous condition is a matter difficult to say, it is more than probable that it was not the measles and mumps alone that caused this nervous condition but the aggregate of all the things that occurred to him while in the army. This much, however, is certain that the record is replete with proof that his nerves were shattered and have been continuously a portion of his disability (R. 21-22; 34; 56; 131; 141; 144 and 151). His nerves were so completely shattered that he cannot on account of his nervous condition, even live in a town or city (R. 99).

3.—COLITIS, POISONED WATER, DYSENTERY:

The Appellee hardly got out of the hospital from the above mentioned attacks when he was sent overseas and sent to the front line trenches on the Meuse-Argonne front. He was up there some sixteen days, started back for rest camp, but was immediately ordered back up to the front where he remained for another ten days. During this time, they were unable to get any water for drinking except out of the shell holes and in coulees on the front, that was the only water they had to drink. It was infected by reason of the fact that before gathering in the shell holes and coulees, it had run over dead men, dead horses, and in addition was contaminated by the fact that the area was entirely covered with poisonous gas which sinks down and settles in the lowest spots and settled in the water, contaminating it. The only food they had to eat was food that was carried in cans. From the food and the poisoned water, the Appellee, suffered severe

cramps, dysentery and diarrhea to such an extent that it caused him to pass blood and had continuous spells of nausea and vomiting (R. 24-25). This has remained with him continuously causing him to get spells of vomiting where he could not even hold common drinking water on his stomach. Such spells will come on him at intervals and sometimes will last as long as a month (R. 26). The repeated and continuous dysentery and diarrhea has in the opinion of the doctors caused a condition of colitis which as the records show was diagnosed by the doctors as early as 1924 (R. 118) (R. 119). He has continuous and alternating spells first of diarrhea and then constipation and cramps in the abdomen (R. 119). This contion, too, is of a permanent nature and incurable. Dr. Richards states that his colitis condition in 1924 was not only diagnosed colitis but that the prognosis was very doubtful. That only time could tell whether or not the condition was permanent (R. 119-120). Time and the actual experience has proven that it is permanent because it has remained with him all these years.

4.—SEVERELY GASSED:

After returning to the Argonne on the second occasion, the Appellee was severely gassed. When they went up the second time, they had many new men as replacements and in helping the new men get on their gas masks, he himself got considerable gas before he could get his mask on. It was mustard or cloud gas. It effected him in the usual way gassing effects men, choked him, he was unable to get his breath, became sick to his stomach and ever since he has been short-winded (R. 25-26).

This severe gassing has probably contributed and increased the disability which the Appellee has described as continuous stomach trouble and which the doctor finally diagnosed as colitis, that had its inception with the drinking of the poisoned water as well as being the cause of his continuous shortness of breath.

Appellee's experience with the poisoned water and gas is an experience which many other soldiers had but here is demonstrated the wisdom of the Supreme Court in the language above quoted wherein they say:

> "That which sometimes results in total disability may cause slight inconvenience under other conditions."

One of the witnesses for the Appellee with him at the time they were gassed had the same experience of drinking poisoned water and the same experience of being gassed with the same results of shortness of breath and dysentery, weakness and loss of weight, but he recovered (R. 141-142) but the circumstances were different. He had not been injured in the leg prior to this experience, he had not been weakened by months in the hospital by reason of measles and mumps, the wounds that he afterwards suffered were of a far less serious nature, he did not have his leg blown off. The Appellee on the other hand was weakened at the onset of the attack of stomach trouble and dysentery and the effect therefore was greater; the Appellee in addition to that afterwards suffered a far more serious disability in having his leg blown off which naturally makes the disability suffered before the loss of his leg more apt to tear down his constitution.

5.—LEG BLOWN OFF:

In the afternoon of October 31, 1918, the Appellee was hit with shrapnel in the left leg, completely shattering the leg, when he came to he was in a dressing station and was later carried by an ambulance to a field hospital where they amputated his left leg, just above the knee (R. 27-28). The leg became infected with gangrene, after he had been moved from the field hospital to a base hospital where they treated the leg for the gangrene and operated on him several times. His condition at that time was such that he cannot remember how many times he was operated upon but he knows that it was more than once (R. 28-29) and in one of the operations they had to cut the leg off again. His leg was first amputated about two inches above the knee (R. 31). The second time it was cut off, it was cut off about five inches above the knee (R. 126). After his return to this country a third operation was necessitated in which they took off what was called a "spur" (R. 31). The loss of the leg has disabled him the same as it would any other man with his training, experience, mental capabilities and education.

APPELLEE NOT MERELY A ONE-LEGGED MAN

Appellee is seeking to recover his insurance not upon the fact that he is a one-legged man, nor upon the fact that he has continuously suffered a severe stomach disorder which despite constant treatment and dieting has caused continuous spells of vomiting, nausea and severe cramps, nor does he seek to recover because the severe gassing which he encountered has continuously

caused shortness of breath and consequent inability to exert himself, nor does he seek to recover simply because his nerves have become completely shattered and wrecked to such an extent that he cannot even reside in a small rural town because of the effect of the activity there upon his nervous system, but Appellee seeks to recover his insurance because he contends and the jury believed and the Court believed that the combination of all of these disabilities has unfitted him for any occupation whatever.

VOCATIONAL TRAINING

Appellee took about three months' vocational training at the Agricultural College at Bozeman, Montana, with the objective of becoming a crop inspector or meat inspector (R. 33 to 35) (R. 83). While in vocational training, the Appellee was constantly ill, continuously vomiting, continuous stomach trouble, his nervous condition was such that he was jumpy and excitable and was unable to apply himself or study (R. 34-35). In addition to this because of his previous education and lack of knowledge of the English language, it was absolutely impossible for him to keep up with his class. He was unable to understand English well enough to learn anything and after talking the matter over with his instructors, he was compelled because of his physical condition and lack of knowledge to quit training (R. 34-35).

WORK RECORD

The record shows that the Appellee has not earned $100.00 by his own effort, since his discharge from the

army, and it likewise shows that he has been unable to do anything that a nine-year-old boy or an eighty-year-old man cannot do. Appellant predicates his argument that Appellee has earned some money by a statement not warranted by the evidence. Appellant states that the Appellee had an income of $10,000.00 in addition to the amounts received by his compensation and soldier's bonus, and through inheritance and unpaid loans. This is not a fact. The testimony shows that the total amount of money deposited by him from the date of his discharge until date of trial was $27,218.92 (R. 171) and the testimony shows that he received by way of compensation and deposited in the bank $14,832.62 (R. 173) and in addition he received $240.00 training pay (R. 173) and he borrowed $2,500.00 cash and placed that in the bank (R. 179), that he borrowed an additional $1,800.00 in cash and placed that in the bank (R. 179), that he inherited $600.00 and placed that in the bank (R. 180), and he received $750.00 on his Adjusted Compensation Certificate and deposited that in the bank (R. 180); in addition to this according to the testimony of the President of the Bank, he borrowed from the bank and deposited in the bank from $250.00 to $300.00 each year (from the date of his discharge until the date of trial, a period of seventeen years) (R. 178-179). In its most favorable light, this would amount to the sum of $5,-100.00, which leaves a balance of $1,396.30 acquired by him over a period seventeen years from sources other than those mentioned above. If we assume a fact not shown in evidence that this $1,396.30 was the result of

his own earnings, the proof in the record amounts to no more than to say that he did earn in such fashion the sum of $82.13 a year.

Appellant argues that because Thompson has acquired title to certain land, certain farm machinery and cattle, that he has worked to acquire this property and that this fact negatives his contention of total permanent disability. However, the premises from which counsel argues is contrary to the evidence. In the first place, his property was acquired not from any effort on his part, after his discharge from the army, but was acquired before he went into the army and while in the army. The evidence shows that he filed on a homestead before he went into the army (R. 36) and that he placed some of the improvements necessary to prove up said homestead on the land before he went into the army, and the balance was placed on the land while he was in the army (R. 36-37) and his residence and work necessary to prove up was all done prior to his entry into the army (R. 36-37).

That such proof could be made cannot be questioned—our Homestead Acts provide for just such proof (See Secs. 271, 272 and 273 U. S. C. A. Title 43) (R. S. Sec. 2305; March 1, 1901, c. 674, 31 Stat. 847; July 28, 1917, c. 44 Sec. 2, 40 Stat. 248; February 25, 1919, c. 37, 40 Stat. 1161; Apr. 6, 1922, c. 122, Sec. 1, 42 Stat. 491).

The evidence discloses that he bought the present property on which he now resides by borrowing $2,500.00 from his cousin, Carl Bue, and giving him a mortgage upon the land that he bought as well as upon the homestead; subsequently he paid back the $2,500.00 by deeding the home-

stead to the said Carl Bue (R.38and100); in other words, the place that he is residing on now represents nothing more than a trade of the homestead he acquired by work done prior to the time that he entered into the army for the land on which he now resides. The other land that he bought, he bought with money that he borrowed, and to secure which he gave a mortgage which is past due and in default, and on which he has paid nothing (R. 38). The farm machinery and cattle have all been purchased with the money paid to him for compensation, none of it was the result of his own effort (R. 38-39).

At no time has he acquired enough income from the ranch to keep the ranch self-supporting (R. 39 and 109). He acquired the ranch not for the purpose of farming it or deriving any income from it but merely to have a home (R. 100). There has never been a year since he got out of the army when the returns from the land were sufficient to pay for the help required to run it or has there been a year that he could have paid the men to run the place had it not been for the compensation he received from the Government (R. 109 and 113).

The Appellant in his brief speaks of him supervising a farm. The extent of his supervision is such supervision as could be given by anyone who is laying on his back completely paralyzed—somebody comes and tells him that the fence is down and he tells the man to fix it, never goes out to inspect the work that they do, is unable to do so All other work done on the ranch is supervised the same way (R. 116-117). The evidence shows that this man never did any work on the ranch himself, that at all times when

any work was to be done, he had hired men to do it, paid them out of his compensation. The greatest amount of cattle that he has had at any time is forty head, (R. 39) the testimony is that he was not able to take care of them himself nor do any work toward taking care of them but hired a man to do it (R. 39). It is common knowledge that a man at all physically able can take care of three hundred to five hundred head of cattle, except during the time of haying.

ISOLATED PORTIONS OF EVIDENCE CITED BY APPELLANT

Counsel for the Appellant contends the Appellee rides a horse. The evidence is that he has on several occasions got on an old gentle plow horse and rode it on a walk; that to get on the horse he has to get up on a box or cut bank or something of that kind, put his right foot in the stirrup, then take his right foot out of the stirrup and swing it over the horse's back; that to do this, if the horse moved, he would fall off and get seriously hurt (R. 40). This testimony of the Appellee was corroborated by all the other witnesses. In other words, the testimony discloses that he can ride a horse just like a six-year-old child, many of whom have been put on just such a horse and rode it at a walk.

Counsel for the Appellant contends that Appellee is able to work because he has milked a cow. The record discloses that he can milk a gentle old cow, but that in attempting to do so, he got hurt and that with only two cows to milk, it is the hired man who does the milking. (R. 39).

Counsel for the Appellant contends that he drives a team and consequently is able to work. The Record discloses that never since he got out of the army has he been able to harness a team; that he did drive a derrick team hitched to a little cart while putting up hay (R. 40). The evidence also discloses that a neighbor saw him drive such a team and this neighbor explains just how difficult this work is by saying that he has a son nine years old who does the same thing (R. 135).

Counsel for the Appellant contends that he has driven a car and that that indicates that he can work. The evidence shows that he has driven a car but the evidence also describes what motions it is necessary for him to go through to drive it, that when he drives a car even for a short distance, he gets so nervous and it hurts his back so much that it is necessary for him to stop and rest on one or two occasions even when he drives a distance of twenty-five miles (R. 40 and 41). His testimony in this respect is corroborated by practically all of the witnesses called to the stand.

Counsel for the Appellant makes mention of the fact that his place looks good and well kept and the forty acres of hay appear to be in good condition. This is nothing more than a compliment to the man he has hired because the evidence discloses that he never at any time, himself, put in any crop or did anything to make the place look good; that it has been maintained exclusively, as pointed out above, by compensation paid to him by the government, and has not been maintained by any effort of the Appellee or any funds acquired from the working of the ranch.

APPELLEE MADE IMMEDIATE APPPLICATION FOR HIS INSURANCE

As early as December 18, 1919, Appellee wrote the United States Veterans Bureau:

> "I know that a number of men similarly injured are drawing their insurance. I am writing to you to inquire whether I am entitled to do likewise. I am drawing a $30.00 per month compensation and I am totally and permanently disabled insofar as my former occupation of farming is concerned." (R. 65 and 67.).

ALL OF APPELLEE'S DISABILITIES AROSE PRIOR TO HIS DISCHARGE FROM THE ARMY

Each of the disabilities above enumerated arose prior to the time he was wounded in the left leg and had the leg taken off, and have constantly remained with him and disabled him during all of the years since that time, as is shown above. In addition he was discharged by a surgeon's "Certificate of Disability" (R. 42) with a notation upon his discharge that his physical condition at the time of discharge was poor (R. 44).

EVIDENCE CONFLICTING

The mere reading of the summary of evidence contained in the brief of the Appellant and of the summary given above or of the evidence given in the pages of the Record cited above discloses that there was considerable conflict in the evidence. Certainly there is much conflict with the inferences that the Appellant now seeks to draw from the evidence. As an illustration, Appellant seeks to infer from the fact that the Appellee in signing a letter to the government written out by someone else way back on Dec. 18, 1919, did not mention his stomach trouble and the condi-

tion of his bowels, and mentioned only his major disability, the loss of his leg and slight wounds about the face, that therefore the other disabilities did not exist or were not at all disabling (See Brief of Appellant p. 12), yet it cannot be contradicted that there is evidence in the Record that from the time he drank the poisoned water and became gassed, he had continuous dysentery and vomiting spells, nor can it be contradicted that the Record discloses that a government doctor diagnosed this condition as chronic colitis from infected bowels, the result of severe and chronic dysentery (R. 117 to 124). Nor can it be doubted that the doctor at that early date questioned the possibility of the Appellee recovering from the colitis and infected bowel condition.

Counsel argues that it should be inferred from the evidence that these different disabilities, other than the loss of his leg, might have yielded to treatment but this is pure speculation. The injury to his right knee, the drinking of the poisoned water and gassing all took place at the Front. It is possible, true, that had he immediately reported back to a hospital, he might have recovered from the effects of these diseases, but certainly the contract of insurance did not contemplate that a Regiment or Division after drinking poisoned water or getting gassed should all report back to the hospital. The fact is, as shown by the evidence, that the Appellee reported to the hospital after all these things happened, and his life thereafter for more than a year was just one hospital after another, and if treatment could have been of avail, the treatment he received in the various hospitals should have accomplished this cure. It

is a fair inference that not having been cured, it could not be cured. In fact the testimony, itself, shows that it was incurable, and discloses that the doctors at the hospital told him nothing could be done for the injured right knee (R. 55-56). The doctors in the army told him that nothing could be done for his stomach and bowel condition, that it might clear up after he had rested and had good food, but there was nothing that they could do for it (R. 55). Yet with the proper food and after his discharge from the army, we find the government doctors giving a prognosis of the condition as very doubtful and subsequent history thereof shows that it has not been cured and could not be cured by proper food.

This Court in passing on the question here involved must not only assume as established all the facts that the evidence supporting Appellee's claim reasonably tends to prove but must assume as established all reasonable inferences fairly deducible from such facts.

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74 l. ed. 720

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84 F. (2nd) 808.

CONCLUSION

The five disabilities suffered by the Appellee while in the army and shown to have remained with him and to have disabled him ever since his discharge coupled with the fact that he was discharged on a surgeon's Certificate of Disability with his physical condition at that time shown by the discharging officers to have been poor, and that all of his disabilities have clearly been shown to have arisen

while his policy was in effect, and that almost immediately after his discharge from the army, he sought to recover his insurance and that there is no work record at all to contradict his statement that he has been unable to work, all taken in conjunction with his previous experience, knowledge and education and the type of man he was, conclusively establishes that there was no error in submitting the case to the jury and that there was not only ample evidence to sustain their verdict but that the evidence was such that would compel the verdict given.

Respectfully submitted,

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